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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1483

UNITED MINE WORKERS OF AMERICA, *Petitioner,*

v.

SOUTH-EAST COAL COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement	4
Reasons for Granting the Writ	15
Conclusion	33
Appendix	1a

TABLE OF AUTHORITIES

CASES:

Allen Bradley Co. v. *Local 3, IBEW*, 325 U.S. 797 (1945) 22

American Federation of Musicians v. *Carroll*, 391 U.S. 99 (1968) 23

Apex v. *Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940) 15, 17, 18, 19

Associated Milk Dealers, Inc. v. *Milk Drivers Local 753*, 422 F.2d 546 (7th Cir. 1970) 16

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) 22

Commonwealth Coatings Corp. v. *Continental Casualty Co.*, 393 U.S. 145 (1968) 30, 31

Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) 18

Lewis v. *Pennington*, 400 F.2d 806 (6th Cir. 1968), *affirming in part*, 257 F. Supp. 815 (E.D. Tenn. 1966), *cert. denied sub nom. Pennington* v. *UMWA*, 393 U.S. 983 (1968) 7

Local 24, Int'l B'hood of Teamsters v. *Oliver*, 358 U.S. 283 (1959) 22, 23

Local 189, Amalgamated Meat Cutters v. *Jewel Tea Co.*, 381 U.S. 676 (1965) 19, 20, 23

Mattox v. *United States*, 146 U.S. 140 (1892) 30, 31

Mine Workers (UMW) (Dixie Mining Co.), 76 L.R.R.M. 1394 (NLRB Feb. 26, 1971) 24

Page

NLRB v. *Local 449, Teamsters Union*, 353 U.S. 87 (1957) 20
Northern Pac. Ry. v. *United States*, 356 U.S. 1 (1958) 18
Pekar v. *United States*, 315 F.2d 319 (5th Cir. 1963) .. 31
Ramsey v. *UMWA*, 265 F. Supp. 388 (E.D. Tenn. 1967), *aff'd*, 416 F.2d 655 (6th Cir. 1969), *rev'd*, 39 U.S.L.W. 4245 (U.S. Feb. 24, 1971) ..4, 5, 7, 12, *passim*
South-East Coal Co. v. *Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970) 11, 12, 13, 14, 16
Standard Oil Co. v. *United States*, 221 U.S. 1 (1911) ..5, 19
Tennessee Consolidated Coal Co. v. *UMWA*, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970) 7
Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951) 18
Tumey v. *Ohio*, 273 U.S. 510 (1927) 30, 31
UMWA v. *Gibbs*, 383 U.S. 715 (1966) 25, 28, 29
UMWA v. *Pennington*, 381 U.S. 657 (1965) 4, 5, 10, 12, *passim*
United States v. *Harry Barfield Co.*, 359 F.2d 120 (5th Cir. 1966) 30, 32
United States v. *Hutcheson*, 312 U.S. 219 (1941) 23
United States v. *Parke, Davis & Co.*, 362 U.S. 29 (1960) 18
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 18
White Motor Co. v. *United States*, 372 U.S. 253 (1963) 19

STATUTES:

15 U.S.C. § 1 (1964) 3
15 U.S.C. § 2 (1964) 4
15 U.S.C. § 17 (1964) 19
28 U.S.C. § 1254(1) (1964) 2
29 U.S.C. § 106 (1964) 4, 13, 26, 27

MISCELLANEOUS:

Address by Milton Handler, AFL-CIO Industrial Union Dept. Lawyers' Conf., Nov. 19, 1965, 60 L.R.R.M. 56 16

Page

Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea,* 66 Colum. L. Rev. 742 (1966) . . 16, 21

Goldberg, *Coordinated Bargaining Tactics of Unions,* 54 Cornell L. Rev. 897 (1969) 16

Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws,* 32 U. Chi. L. Rev. 659 (1965) 16

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, United Mine Workers of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered November 18, 1970, affirming a judgment of the United States District Court for the Eastern District of Kentucky holding petitioner and a co-defendant liable in damages to respondent under section 1 of the Sherman Act, 15 U.S.C. § 1 (1964).

OPINION BELOW

The opinion of the Sixth Circuit is reported at 434 F.2d 767 and is reprinted in the Appendix hereto, p. 1a *infra.*

JURISDICTION

The judgment of the Sixth Circuit was entered on November 18, 1970. By order dated January 26, 1971, Mr. Justice Stewart extended the time for filing the petition for a writ of certiorari to and including March 18, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1964).

QUESTIONS PRESENTED

1. Whether any agreement between a union and an employer or group of employers that the union will seek specified labor standards outside the bargaining unit constitutes a *per se* violation of the Sherman Act, without regard to an analysis of the agreement's effect on competition under the "rule of reason"?

2. Whether antitrust liability may be imposed upon a union for the execution of a collective bargaining agreement that is lawful on its face, merely on the theory of an intent to injure coal producers, without any finding (a) that the agreement exceeded the permissible scope of bargaining about wages, hours and working conditions and worked competitive injury within the bargaining unit, or (b) that it was entered into as part of a larger agreement between the union and favored employers to injure competition outside the bargaining unit?

3. Whether the "clear proof" requirement of section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106 (1964), is satisfied by an instruction which wholly fails to distinguish for the jury between the clear proof standard and the lesser standard of preponderance of the evidence, on which the jury has been instructed in detail?

4. Whether the failure to strike a juror with continuing business contacts with a close relative of a stockholder and former officer in the plaintiff corporation and the failure to take action upon two instances where jurors engaged in discussions with a party and a third person denied petitioner its constitutional guarantee to a fair and impartial trial?

STATUTES INVOLVED

15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or

between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

29 U.S.C. § 106:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

STATEMENT

This case grows out of the same factual matrix as two other cases recently decided by this Court, *Ramsey* v. *UMWA,* 39 U.S.L.W. 4245 (U.S. Feb. 24, 1971), and *UMWA* v. *Pennington,* 381 U.S. 657 (1965). As

in *Ramsey* and *Pennington,* a coal operator brought suit under the Sherman Act claiming that the union and the major coal operators had conspired to impose wage scales and working conditions on the entire coal industry which rendered it impossible for many sm ller operators to survive. This case presents an issue left open in both *Ramsey* and *Pennington*—whether it is a *per se* violation of the Sherman Act for a union and an employer or group of employers to agree to basic contract terms with the understanding that the union will insist upon the same terms in its negotiations with other employers. *Pennington* held that in such circumstances the union forfeits the exemption from the antitrust laws established by the confluence of the Clayton and Norris-LaGuardia Acts. In this case the courts below held that any such agreement constituted a *per se* violation of § 1 of the Sherman Act, without any necessity for examination of the nature, purpose and effect of the restraint under the "rule of reason," *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911).

In 1950 more than a decade of unremitting strife in the coal industry was terminated by the signing of the National Bituminous Coal Wage Agreement (NBCWA). A major provision of that agreement established the United Mine Workers of America Welfare and Retirement Fund of 1950 and required the signatory operators to contribute to the Fund on a tonnage royalty basis. Later amendments fixed the contribution level at forty cents per ton. Shortly after negotiation of the agreement, the Bituminous Coal Operators Association (BCOA) was formed to act as a bargaining agent for the operators in their negotiations with [redacted] the United Mine Workers of America (UMWA). Membership in BCOA was and is open

to all coal producers, large and small, and many of its members are relatively small companies. Respondent, South-East Coal Co., which was classified in the category of the largest mining companies, was a member of the Southern Coal Producers Association (SCPA), a separate bargaining unit whose members were also signatories to the NBCWA. Consolidation Coal Co., the union's co-defendant in the trial court, was a member of BCOA.

Throughout the 1950s one of the major problems in the administration of the NBCWA was so-called "sweethearting." Because of the difficult times in the coal industry, many operators claimed they were unable to meet the royalty payments specified in the agreement. The operators charged that at times the union agreed, tacitly or otherwise, not to enforce the royalty payments from certain operators. Another major problem was the practice of coal companies to purchase cheaper non-union coal, on which no royalty payments had been made, for resale, or to lease their lands and facilities to non-union companies (frequently mere dummy corporations) whose coal they then purchased.

In 1958 an amendment to the NBCWA, referred to as the Protective Wage Clause (PWC), was negotiated to deal with these problems. The PWC provided that the union would not agree with any signatory operator during the term of the contract to give that operator more favorable terms than those contained in the agreement.[1] In return, the operators agreed not to purchase coal produced under terms and

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[1] 1. Paragraph A of the PWC reads:

> During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any

conditions of employment less favorable to the employees than those of the NBCWA and not to lend their land or facilities to the production of coal under such less favorable terms and conditions.[2] The presi-

wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all parties signatory thereto.

Plaintiffs in the series of antitrust cases brought against the union since the PWC have contended that this language binds the union to negotiate wtih non-signatories only on the basis of the national contract. Though one jury apparently read the PWC this way, see *Tennessee Consolidated Coal Co.* v. *UMWA*, 416 F.2d 1192, 1197 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970), no court has construed the clause to have any impact outside the bargaining unit, see *Ramsey* v. *UMWA*, 416 F.2d 655, 659 (6th Cir. 1969), *affirming* 265 F. Supp. 388, 412 (E.D. Tenn. 1967), *rev'd on other grounds*, 39 U.S.L.W. 4245 (U.S. Feb. 24, 1971); *Lewis* v. *Pennington*, 400 F.2d 806, 814-15 (6th Cir. 1968), *affirming in relevant part* 257 F. Supp. 815, 862 (E.D. Tenn. 1966), *cert. denied*, 393 U.S. 983 (1968). The issue of the PWC's extra-bargaining unit impact was not put to the jury in this case.

[2] This promise was contained in paragraph B of the PWC, which read in relevant part:

It is recognized that when signatory operators mine, prepart, or procure or acquire under subcontract arrangements, bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract.

dent of South-East Coal seconded the motion to adopt the PWC amendment at a meeting of the SCPA.

In 1959 South-East Coal entered into an exclusive sales agency agreement with Consolidation, under which the latter sold all of South-East's coal production on the open market. In December 1961, South-East wrote to Consolidation terminating that agreement. In January 1962 South-East withdrew as a signatory to the NBCWA and as a member of SCPA, claiming that it had found it impossible to operate profitably under the collective bargaining agreement. This was followed by a strike at South-East's mines called by the UMWA, which refused to enter into an agreement more favorable to South-East than the NBCWA.

In 1964 the NBCWA was amended again, dropping the PWC in favor of a new clause, the so-called "eighty-cent" provision. Under that clause, the operators agreed to pay the normal forty-cent royalty on all coal produced by them, and to pay 80 cents per ton on all coal purchased by them on which the producer had not paid the forty-cent royalty, *i.e.*, non-union coal.

South-East Coal sued the union and Consolidation in 1966, alleging a conspiracy to restrain trade in violation of the Sherman Act. The case was tried to a jury in the United States District Court for the Eastern District of Kentucky. The jury returned a verdict for the plaintiff against both defendants in the amount of $2,410,452, which was trebled to $7,231,356. Attorneys' fees in the amount of $335,000 were allowed, making the total judgment $7,566,356.

There was no direct evidence of a conspiracy to drive South-East Coal Co. or any other operator or

group of operators out of business. All the direct evidence was to the contrary. Judge Mac Swinford instructed the jury that the illegal conspiracy could be inferred from the actions of the parties.

Judge Swinford's instructions on the elements of an antitrust conspiracy are not entirely clear, but it appears that the jury could have found the defendants liable on either of two theories: (1) that the union had a separate unwritten agreement with the BCOA to impose the terms of the NBCWA on all units in the industry; or (2) that the NBCWA, while on its face a perfectly legal collective bargaining agreement, constituted an illegal conspiracy in violation of the Sherman Act if entered into with the intent to drive some coal operators out of business, or with the conscious knowledge that it would do so.[3]

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[3] These two theories were not presented directly to the jury as alternatives. However, a fair reading of the judge's lengthy charge on the elements of an antitrust conspiracy (J.A. 1838-47) demonstrates that the jury could have found liability either on the basis of an extra-bargaining unit agreement, or on the basis of predatory intent within the bargaining unit itself. For example, at one point the judge unequivocally told the jury that the union had a "duty to bargain unit by unit," (J.A. 1846) and that the union and "the employers in one bargaining unit" were not "free to bargain about wages, hours, and working conditions of other bargaining units." (J.A. 1846) Yet he also said that the union was not exempt if it agreed "with one set of employers to impose a wage scale *on the bargaining unit.*" (J.A. 1846) (emphasis added) In this case the plaintiff was originally a member of the bargaining unit who signed the collective bargaining agreement, and later left the bargaining unit, at which point it was met with the union's insistence on the terms of the national agreement. The jury was not told whether the alleged antitrust violation as it related to the plaintiff occurred before or after the plaintiff left the bargaining unit.

With respect to the first theory, the judge refused an instruction proffered by the defendants that an agreement affecting labor standards outside the immediate bargaining unit was not unlawful unless it constituted an unreasonable restraint of trade. Instead, he told the jury:

> It is a legitimate aim of any national labor organization to obtain uniformity of labor standards, and it may be a consequence of such union activity to eliminate competition based on differences in such standards.
>
> This, however, does not mean that the union and the employers in one bargaining unit are free to bargain about wages, hours, and working conditions of other bargaining units or to attempt to settle these matters for the entire industry.
>
> The union has a duty to bargain unit by unit in order to best serve its obligations to its members.
>
> The Union should retain the ability to respond to each bargaining situation as the individual circumstances might warrant without being strait-jacketed by some prior agreement with favored employers.

(J. A. 1846)[4]

The Court of Appeals for the Sixth Circuit (Judges Phillips, Celebrezze and Brooks) approved this *per se* doctrine:

> The conclusion which can be drawn from [this Court's language in *Pennington*] is that when a

[4] "J.A." references are to the Joint Appendix in Appeal Nos. 19,622 and 19,623 in the United States Court of Appeals for the Sixth Circuit, *South-East Coal Co.* v. *Consolidation Coal Co.* and *South-East Coal Co.* v. *UMWA*. The Joint Appendix has been certified to this Court by the Clerk of the Sixth Circuit in connection with the petition for certiorari filed by the union's co-defendant, Consolidation Coal Co.

> labor union and an employer enter into a plan or scheme of the type which results in the union losing its exemption from liability under the antitrust law, that plan or scheme is by definition an unreasonable restraint under the antitrust laws. . . . While the District Court did not give an instruction that only undue or unreasonable restraints of trade can be grounds for a jury to conclude that there was an antitrust violation, in light of the conclusion that if the alleged conspiracy in this case was proved, it would be by definition unreasonable, no specific instruction on the reasonableness of the restraint was necessary.

(9a-10a) 434 F.2d at 775.

Regarding the second theory, that an otherwise legal collective bargaining agreement becomes an antitrust conspiracy if entered into with "predatory intent," the judge told the jury:

> . . . there is nothing unlawful about that contract [the NBCWA] in itself; but if it was entered into with the intention on the part of the signatories—the two defendants here—to injure the plaintiff, if they had that in mind, that "we are going to go into this contract because we know it will put South-East out of business; they can't meet the conditions; we are too big, too strong, and they cannot compete with us, cannot get miners to work for them, and they cannot sell their coal on the market because they do not have sufficient sales agency, so we will deliberately enter into this and they can't meet it; we will thereby profit by putting competitors out of business or seriously hampering his operation."
>
> So, the issue is: Did these two signatories have that thing of putting the South-East Coal Company out of business in mind, the time they signed the contract?

(J.A. 1842) Later Judge Swinford reiterated:

> You are instructed that the execution of the written contract is not of itself or per se a violation of the law.
>
> In order for the contract to be unlawful you must believe that its execution by the defendants was for the purpose and with the intention, among other things, of destroying or injuring the business of the plaintiff.

(J.A. 1846)

Once again, Judge Brooks, writing for the Court of Appeals, gave his approval to the District Court's alternative antitrust theory:

> Reviewing the [Sixth Circuit's] *Ramsey* decision's interpretation of *Pennington,* four conclusions may be drawn applicable to the present dispute. First, the National Agreement containing the Protective Wage Clause is, on its face, a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions. Second, if this agreement was made or entered into by the union in pursuance of of its own self interests, there are no grounds for concluding a violation of the antitrust laws. Third, if however the employers and union entered into this contract with the conscious knowledge or intent that it would be used to drive competitors out of business (more than the incidental effects caused by the adoption of a union wage agreement which may result in certain operators not being able to function profitably), then a violation of the antitrust laws has occurred. Fourth, it is this either expressly or impliedly agreed-upon use of the valid contract, that is, that it will be used to drive competitors out of business, that comprises the agreement or conspiracy which is illegal for purposes of the antitrust laws. With-

> out deciding the question of the legality of the "80-cent clause" suffice it to be said that these conclusions are also applicable to that provision.

(23a) 434 F.2d at 782.

With respect to the burden of proof, Judge Swinford instructed the jury that they had to find "every essential element of the claim, by a preponderance of the evidence." (J.A. 1835) He defined this standard as proof "that something is more likely so than not so." (J.A. 1835) He later remarked that "such an anti-competitive conspiracy as claimed by the plaintiff must be established by clear proof." (J.A. 1835) The judge did not even purport to define "clear proof" for the jury until later, when a brief supplemental charge was delivered. (J.A. 1915) At no point did the judge explain to the jury the difference between "clear proof" and "preponderance of the evidence" or indicate intelligibly to them that in finding facts under the two standards they had distinct functions to perform.

In affirming the "clear proof" instruction, the Court of Appeals held that the instruction was broader than necessary, because (1) the union was only entitled to such an instruction on the issue of authorization for the conduct of its agents, and not on the issue of conspiracy as a whole, and (2) section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106 (1964), which imposes the clear proof requirement, has no application to employer-defendants.

During the *voir dire* examination of the proposed jurors, it was discovered that one juror had long-standing business relations with the son of a stockholder and former official in the plaintiff, South-East Coal Co.

(J.A. 321-25) The juror's insurance agency underwrote a real estate sales bond for the relative of the stockholder. A challenge for cause to the juror was overruled by the judge, and the juror was seated. (J.A. 325) Subsequently the same juror was discovered to have attended a party during the course of the trial and to have discussed the lawyers in the case and possibly the substance of the case itself with a close friend of his who practiced law nearby and who represented South-East Coal Co. and was representing other coal companies in antitrust litigation. (J.A. 238-44) A motion was made to subpoena the juror and the other persons involved and inquire into the incident. Judge Swinford denied the motion, on the ground that "nothing [had] been shown here to justify an investigation of this juror." (J.A. 244) The Court of Appeals held that neither the overruling of the challenge for cause nor the refusal to subpoena the juror constituted an abuse of the trial court's discretion. (41a-44a), 434 F.2d at 791-92.

During the course of the trial, the president of the plaintiff company, Harry LaViers, Sr., sat next to two jurors at breakfast in a hotel dining room and engaged them in conversation for a period of fifteen minutes. (J.A. 1033-38) The conversation covered mutual acquaintances and other matters. Mr. LaViers denied having initiated the contact, although he admitted that he took the seat next to the two jurors at a time when there were other seats available in the dining room. (J.A. 1035) He also denied that he had discussed the case with the jurors. (J.A. 1035, 1036) The judge denied a mistrial on the ground that there was no discussion of the case and that Mr. LaViers "didn't do anything intentionally." (J.A. 1036)

REASONS FOR GRANTING THE WRIT

1. In *UMWA* v. *Pennington,* 381 U.S. 657, 665 (1965), this Court held that "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." But the question of exemption is only the first issue to be faced when a union is charged with violating the antitrust laws. For this Court has also said that "activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act." *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 512 (1940). The jury in this case was permitted to find a conspiracy in violation of the antitrust laws on nothing more than proof that the union had violated what the judge termed its "duty to bargain unit by unit," without any inquiry into the overall effect on competition flowing from any agreement to impose labor standards beyond the narrow boundaries of the bargaining unit.

The difficulty stems from an apparent ambiguity in the Court's opinion in *Pennington.* On the one hand, the Court was careful to state the question presented and its holding solely in terms of the union's exemption from the antitrust laws. 381 U.S. at 661, 669. There is, however, language in the Court's opinion from which it can be inferred that all "agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit" violate the Sherman Act "without regard to predatory intention or effect in a particular case." 381 U.S. at 668. The Court appeared to say that all such agreements "run counter to antitrust

policy" because "the union surrenders its freedom of action with respect to its bargaining policy." *Id.*[5]

The impact of this ambiguity is dramatically illustrated by the confusion at the core of the jury charge in this case. At one point Judge Swinford partially tracked the language of this Court's opinion in *Pennington*, telling the jury that a "union forfeits its exemption from the antitrust laws when it is clearly shown that it has an agreement with one set of employers to impose a wage scale on the bargaining unit." (J.A. 1846) He also told them that "It is a legitimate aim of any national labor organization to obtain uniformity of labor standards." (J.A. 1846) And again: "Wage differentials should not be the basis for affording to one operator a competitive advantage over another." (J.A. 1847) Yet without any

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[5] The ambiguity in *Pennington* has led to confusion among courts and commentators. Some have concluded that the Court laid down a *per se* rule of antitrust liability. See, *e.g.*, *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970); Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 Colum. L. Rev. 742, 756-57 (1966). Others have concluded that the decision dealt merely with the question of exemption. See, *e.g.*, *Associated Milk Dealers, Inc.* v. *Milk Drivers Local 753*, 422 F.2d 546, 553-54 (7th Cir. 1970); Address by Milton Handler, AFL-CIO Industrial Union Dept. Lawyers' Conf., Nov. 19, 1965, 60 L.R.R.M. 56, 61-64; Goldberg, *Coordinated Bargaining Tactics of Unions*, 54 Cornell L. Rev. 897, 911-12 (1969). Still others have recognized the difficulty and concluded that no *per se* rule should be applied. See *Ramsey* v. *UMWA*, 265 F. Supp. 388, 398-99 (E.D. Tenn. 1967), *aff'd by an equally divided court*, 416 F.2d 655 (6th Cir. 1969), *rev'd on other grounds*, 39 U.S.L.W. 4245 (U.S. Feb. 24, 1971); Meltzer; *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. Chi. L. Rev. 659, 715-22 (1965). See also Comment, 66 Colum. L. Rev. 742, 755-57 (1966).

The Court did not address itself to this question in its recent decision in *Ramsey* v. *UMWA*, 39 U.S.L.W. 4245 (U.S. Feb. 24, 1971). But language in the *Ramsey* opinion appears to continue the tension between the two readings of *Pennington*. *Id.* at 4248.

explanation of the distinction between the loss of the labor exemption and a finding of a Sherman Act violation, the judge went on to say:

> The union has a duty to bargain unit by unit in order to best serve its obligations to its members.
>
> The Union should retain the ability to respond to each bargaining situation as the individual circumstances might warrant without being straitjacketed by some prior agreement with favored employers.

(J.A. 1846) At the same time he rejected an instruction which would have required the jury to assess the competitive impact of any alleged agreement regarding standards outside the bargaining unit under the rule of reason.

The result in this case was a charge which was unintelligible and which permitted the jury to impose seven and a half million dollars in liability on nothing more than a failure to bargain on a "unit by unit" basis. The Court of Appeals affirmed expressly on the ground that it read *Pennington* to lay down a rule of *per se* antitrust liability.

Such a reading of *Pennington* flies in the face of this Court's prior decisions, both within and without the labor-antitrust field.[6] The central premise of *Apex*

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[6] Moreover, such a Sherman Act ruling would have been pure dictum in light of the Court's careful statement of the issue present in *Pennington*, and it seems most unlikely that there was a Court for the *per se* rule. Mr. Justice Douglas, joined by Justices Black and Clark, without whose votes Mr. Justice White's opinion in *Pennington* would not have been an opinion of the Court, wrote a brief separate concurrence in which he made it clear that there must be a finding of predatory intent, in addition to an extra-bargaining unit agreement to hold the union liable under the Sherman Act. 381 U.S. at 672-73.

Hosiery and this Court's other decisions in this area is that unions will not be subjected to the drastic civil and criminal penalties of the Sherman Act unless their conduct does violence to the antitrust laws' concern for the preservation of commercial competition. "[T]his Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services. . . ." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940). *Pennington* cannot be read to transform the Sherman Act in its application to labor unions from a statute about "restraint upon commercial competition" into one concerned with union "freedom of action" in collective bargaining.

This Court has concluded under the Sherman Act that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958).[7] This certainly cannot be said, however, of all "agreements between a group of employers and a union that the union will seek specified labor standards outside the bar-

[7] This doctrine of *per se* illegality has been applied to price fixing, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960) (vertical price fixing); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (horizontal price fixing), horizontal market division, *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), group boycotts, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), and tying arrangements, *Northern Pac. Ry.* v. *United States*, 356 U.S. 1 (1958).

gaining unit," at least not without elaboration of the reasons why such agreements inevitably entail unredeemed pernicious effects, not upon union "freedom of action," but upon "commercial competition in the marketing of good and services"—an inquiry which the Court did not pretend to undertake in *Pennington*, and which the courts below held was unnecessary in this case. *Cf. White Motor Co.* v. *United States*, 372 U.S. 253 (1963). Absent a rule of *per se* illegality rooted in the policy of the Sherman Act to promote competition, the "rule of reason," *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911), demands precisely the inquiry into the "effect in a particular case" of the agreement complained of which the District Court refused to put to the jury in this case.

Moreover, this Court in *Apex Hosiery* recognized that union activity directed to the end of standardizing wages throughout an industry was permissible, not because it was exempted from antitrust liability by the labor laws, but because "an elimination of price competition based on differences in labor standards . . . has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act." 310 U.S. at 503-04.[8] There is no dispute that a union may insist unilaterally upon uniform wage standards throughout an industry. *UMWA* v. *Pennington*, 381

[8] To the extent that an agreement which achieved the objective of uniform wages did restrain price competition, it would do so by removing the cost of labor as a potential element of that competition. But "[t]he labor of a human being is not a commodity or article of commerce," Clayton Act, § 6, 15 U.S.C. § 17 (1964), and thus elimination of competition with respect to it is permissible under the labor and antitrust laws. See *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 723 (1965) (opinion of Goldberg, J.).

U.S. 657, 665 & n.2 (1965). Thus the upshot of reading *Pennington* to lay down a rigid *per se* rule is that conduct which is (a) exempt if engaged in unilaterally by the union and (b) does not entail the sort of anti-competitive consequences at which the proscriptions of the Sherman Act are aimed, becomes *per se* illegal when engaged in pursuant to an agreement between the union and one or more employers.

Such a view of the law has serious consequences for any union or group of employers engaged in industry-wide or multi-employer unit bargaining, a practice which this Court has approved many times, see, *e.g., Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676 (1965); *UMWA* v. *Pennington,* 381 U.S. 657 (1965); *cf. NLRB* v. *Local 449, Teamsters Union,* 353 U.S. 87 (1957) and which is central to the economics of many industries today. The difficulties are multiplied when it is recognized that "the impact of the wage agreement reached with a particular group of employers upon competing employers" lies at "the central core of [collective] bargaining," *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 714 (1965) (opinion of Goldberg, J.), and that this impact will virtually always be a subject of discussion and consideration in the bargaining.

The dilemma becomes truly intolerable in light of *Pennington*'s condemnation of an agreement between a union and an employer or group of employers that the union will charge them lower wages than it has already charged other units in the industry in order to allow the favored employers to compete on a better basis with the disfavored group. See 381 U.S. at 668. Thus if the union agrees on the basic contract with

one group of employers and tacitly or explicitly agrees to seek to impose the same terms on others, it commits a *per se* violation of the Sherman Act. At the same time, if it concludes a basic contract with part of the industry, and then agrees with other units to accept lower standards in order to give them a competitive advantage, it is likewise engaged in conduct which is *per se* illegal. Read in this fashion, *Pennington* reaches both these results without any examination of the actual effect on competition, and without any recognition that national collective bargaining simply cannot as a practical matter be carried out without consideration and understanding of the overall effect of the arrangement on competition in the industry.[9]

This Court should resolve the ambiguity left behind by *Pennington* and provide desperately needed guidance concerning the impact of the antitrust laws on the practice of multi-employer bargaining. For it does not serve the objectives of either the labor law or the antitrust law to impose crushing treble-damage liability upon unions and employers on the basis of

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[9] One commentator has suggested that the Court's

> approach in *Pennington* . . . seems inconsistent with the realities of collective bargaining. Most employer opposition to union demands is supported by the employe's insistence that his competitive market position precludes compliance. Indeed, if the union asks for higher wages and the employer protests that he is unable to afford the increase, the NLRA may require him to substantiate his claim with business records. Moreover, it is often natural for employers to seek, and unions to offer, assurances that competitors will fare no better in the labor market. From such candid bargaining discussions, however, a jury might readily infer an agreement to impose conditions on others, thus subjecting the union to possible antitrust liability under Justice White's rationale.

Comment, 66 Colum. L. Rev. 742, 756 (1966) (footnote omitted).

nothing more than a finding that a union failed to bargain on a "unit by unit" basis, without any examination whatever of the impact of the union's practice of collective bargaining upon competition in the industry as a whole. It is not difficult to imagine a vitally procompetitive national collective bargaining agreement, negotiated first with one major group of employers, which eliminated effective price discrimination based on differentials in labor standards, and which at the same time had some adverse impact upon inefficient competitors. The question with respect to such an agreement under the consistent holdings of this Court is whether it was aimed at the legitimate union goal of achieving and preserving a desired system of wages, *Local 24, Int'l B'hood of Teamsters* v. *Oliver,* 358 U.S. 283 (1959), or was part of a scheme among businessmen "to create business monopolies and to control the marketing of goods and services," *Allen Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797, 808 (1945). To condemn any such agreement out of hand at the behest of an injured competitor, without any examination of its overall impact upon competition would defy this Court's repeated holdings that the antitrust laws are concerned with "the protection of *competition,* not *competitors.*" *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962). Yet that is precisely what the lower courts allowed to happen in this case.

2. Under the alternative theory of the courts below the union was subject to antitrust liability without even entering into the sort of extra-bargaining unit agreement which forfeits the labor exemption under *Pennington.* The trial judge told the jury that "the contract" was a perfectly legal collective bargaining

agreement, but that its execution could be the occasion of antitrust liability if it was entered into with predatory intent.

It is plain under the decisions of this Court that the execution of the collective bargaining agreement was an act protected by the labor exemption, so long as its provisions legitimately related to wages, hours and working conditions, *American Federation of Musicians* v. *Carroll,* 391 U.S. 99 (1968); *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676 (1965); *Local 24, Int'l B'hood of Teamsters* v. *Oliver,* 358 U.S. 283 (1959), and that the thrust of the labor exemption was to remove from the courts the power to impose liability on unions on the basis of an evaluation of their subjective motivation, *United States* v. *Hutcheson,* 312 U.S. 219, 232 (1941).

The execution of the collective bargaining agreement could only have violated the antitrust laws if (1) some or all of its provisions exceeded the legitimate scope of bargaining about wages, hours and working conditions, and worked some injury to competition within the bargaining unit, or (2) it was part of a larger anticompetitive scheme to drive operators outside the bargaining unit out of business by imposing burdensome terms on them pursuant to a collateral agreement between the union and the favored employers. The jury in this case was permitted to impose punitive treble damages on the union and one signatory employer without making either finding. The judge expressly excluded the first possibility by telling the jury that "the contract" itself was a wholly lawful collective bargaining agreement. And he permitted them to find liability merely on the basis of predatory intent, without finding any agreement relating to

standards outside the bargaining unit or any impact on competition within or without the unit.

Moreover, if we assume that on this alternative theory the judge had reference, not to the impact outside the bargaining unit, but solely to the effect of the agreement on signatories, the charge is hopelessly confusing. The judge never told the jury what was "the contract" whose execution could be illegal if accompanied by predatory intent—whether he had reference to the pre-PWC agreement, the 1958 contract containing the PWC, or the later agreement which substituted the eighty-cent clause for the PWC. Because of this he never identified what provision or provisions in "the contract" might have been used in a predatory manner or how the predatory scheme might have operated to injure competition. The case was not submitted to the jury on the theory that either the PWC or the eighty-cent clause restrained trade within or without the bargaining unit.[10] Instead, the jury was merely told that "the contract," while law-

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[10] The National Labor Relations Board has recently ruled that the eighty-cent clause is a valid union standads clause, and not a forbidden "hot cargo" clause. *Mine Workers (UMW) (Dixie Mining Co.)*, 76 L.R.R.M. 1394 (NLRB Feb. 26, 1971). The Board noted that "[t]he validity of a union standards clause lies in the fact that it removes the economic incentive to subcontract unit work to employers maintaining substandard conditions of employment which enable such employers to perform the work at cheaper labor costs." *Id.* at 1395. The Board expressly held that the fact that there wee several bargaining units did not render the clause invalid. Moreover, it stated:

> The fact that some signatories have ceased buying coal from nonsignatories in order to avoid the 80-cent payment imposed by the contact merely bears out the fact that the clause does in fact remove the economic incentive to purchase coal mined under substandard conditions of employment. This is, of course, a valid function of a union standards clause.

ful on its face, violated the antitrust laws if entered into with a bad intent.

Without some analysis from the judge of how the contract's provisions could have operated within the bargaining unit to injure competition, or some requirement that they find an additional agreement to impose its terms outside the bargaining unit, the jury was left at large to impose liability on the basis of a dislike of the union's motives, a result which the labor exemption was expressly designed to prevent.

3. The "clear proof" instruction given by the trial court in this case was totally ineffective to convey to the jury a notion of its responsibility as a fact-finder. The instruction was virtually identical to the one condemned by this Court in *UMWA* v. *Gibbs,* 383 U.S. 715, 737 n. 29 (1966). In the present case the trial court, in the course of a charge covering twenty-seven printed pages, instructed the jury at length on the preponderance of the evidence standard, with one passing reference to the necessity of clear proof on the conspiracy issue:

> But it is the responsibility of the plaintiff to sustain this burden of proof. Now, by "burden of proof," it doesn't necessarily mean the greater number of witnesses. Sometimes the burden of proof in lawsuits can be sustained by one witness as contrary to fifteen on the other side, and so you are not to confuse the idea of "burden of proof" with numbers of witnesses or numbers of depositions or other articles of evidence that might be offered.
>
> But it must convince you, before this plaintiff may recover, it must sustain its burden of proof by proving every essential element of the claim, by a preponderance of the evidence.

Should it fail in its proof, under this rule you should find for the defendant.

To establish the preponderance of the evidence means to prove that something is more likely so than not so; in other words, the "preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely to be true than not true.

In determining this fact, you should consider the testimony of all witnesses, both those who appeared on the witness stand and those who gave their testimony by deposition, or whose testimony was offered by transcript, regardless of who called the witness; in other words, consider all the evidence, not just the plaintiff's evidence, not just the defendant's evidence, but consider all of the evidence.

You are to give consideration to all exhibits received in evidence, regardless of who may have produced them.

Such an anti-competitive conspiracy—and that is what this is; in other words, it is claimed by plaintiff here that this arrangement was restraining competition, was monopolizing the field of coal production, and that you either had to belong to it or you were likely to be put out of business or suffer substantial financial loss—and such an anti-competitive conspiracy as claimed by the plaintiff must be established by clear proof.

(J.A. 1835-36) A later supplemental instruction wholly failed to distinguish between preponderance and clear proof:

Members of the jury, the Court has already charged you that the issue of alleged conspiracy in

> this case must be decided upon clear proof, that is that the plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal, and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof. I want to give you that additional instruction as a definition for one of the terms I used in my charge.

(J.A. 1915)

The Court of Appeals affirmed on the basis that the clear proof instruction was broader than required by § 6 of the Norris-LaGuardia Act. It reasoned, first, that the union was only entitled to a clear proof instruction on the question of actual participation, authorization or ratification with knowledge of the acts alleged to constitute the conspiracy, and not upon the occurrence *vel non* of those acts. In this the court was correct. *Ramsey* v. *UMWA,* 39 U.S.L.W. 4245 (U.S. Feb. 24, 1971). Next the court held that the employer was not even entitled to the protection of the clear proof rule in the first place. In this it was incorrect. *Ramsey* v. *UMWA, supra* at 4247 n.8. Thus, the court concluded, both parties received more than they deserved when the trial judge instructed the jury it had to find "the conspiracy" by clear proof.

This "harmless error" approach to the clear proof instructions does not withstand analysis, because of the confusion concerning the issues to which the clear proof test was applicable. First the judge said that "every essential element of the claim" had to be made out by a preponderance of the evidence. Then he said "the conspiracy" had to be shown by clear proof. And in the supplemental instruction he said that this

meant that participation, authorization or ratification had to be clearly shown. It is true that the jury might, in the confusion have applied the test to the existence *vel non* of the conspiracy. But it cannot be said that they were intelligibly instructed that the issue of agency was to be treated under a more stringent standard of proof, as required by § 6. See *Ramsey* v. *UMWA, supra.*

The clear proof instructions were, moreover, subject to another fundamental defect. The jury may have been told to apply the test to issues to which the defendants were not entitled to have it applied. But they were not told what the standard was and how it differed from simple preponderance of the evidence. As this Court held in *Gibbs*:

> Under this [clear proof] standard, the plaintiff in a civil case is not required to satisfy the criminal standard of reasonable doubt on the issue of participation, authorization or ratification; neither may he prevail by meeting the ordinary civil burden of persuasion. He is required to persuade by a substantial margin, to come forward with "more than a bare preponderance of the evidence to prevail."

383 U.S. at 737.

In this case, as in *Gibbs,* the meaning of the clear proof standard was never explained to the jury. The supplemental instruction given by the trial judge was almost identical in wording to the one given in *Gibbs.* Could a jury of untutored laymen, listening to the original charge and the supplemental instruction, have conceivably understood that there were two different standards of proof applicable to different issues in the case? Could it have known what those standards were,

and could it have ferreted out the issues to which the different standards were applicable? The confusion is compounded by the judge's choice of closely similar language to describe the two standards. Can any jury have been expected to known that evidence which "has more convincing force" and which "produces in your minds belief" is a lesser standard than "clear, unequivocal and convincing" evidence? As in *Gibbs*

> The possibility is strong that the jury either did not understand the phrase ["clear proof"] or completely overlooked it in the context of the lengthy charge given.

UMWA v. *Gibbs, supra* at 737 n.29.

To allow the charge of the court below to stand in this case would make a mockery of Congress' intent that "when illegal acts of any individual are charged against one of the major antagonists in a labor dispute—whether employers or union—the evidence must clearly prove that the individual's acts were authorized or ratified." *Ramsey* v. *UMWA, supra,* at 4247. No jury listening to Judge Swinford's instructions could have realized that that was what they were required to find.

4. During the course of the trial several incidents occurred which raised grave doubts concerning the impartiality of individual jurors. The lower courts' handling of these matters was inconsistent with the fundamental constitutional right to a trial by a fair and impartial jury, and with this Court's repeated admonitions that

> the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any

> ground of suspicion that the administration of justice has been interfered with be tolerated.

Mattox v. *United States,* 146 U.S. 140, 149 (1892)

The revelation on *voir dire* that one juror had long-standing business relations with the son of a stockholder and former officer in the plaintiff corporation clearly provided grounds for a challenge for cause, despite the juror's self-serving denial that his judgment would be affected in any way. (J.A. 324-25) See *United States* v. *Harry Barfield Co.,* 359 F.2d 120, 123 (5th Cir. 1966). In *Tumey* v. *Ohio,* 273 U.S. 510 (1927), this Court held that fundamental due process considerations barred one with a financial interest in the outcome of litigation from sitting in judgment on the rights of the parties. In *Commonwealth Coatings Corp.* v. *Continental Casualty Co.,* 393 U.S. 145 (1968), the Court overturned a commercial arbitration award where the supposedly neutral third arbitrator had failed to disclose to one party the fact that he had had small but continuing business relations with the other party over the course of several years. There the Court rejected the argument that the amount of the judge's compensation in *Tumey* turned on whether he found the defendant guilty or innocent. This was, the Court said, "too small a distinction to allow this manifest violation of the strict morality and fairness" demanded of those who sit in judgment on controversies. *Id.* at 148.

Here, as in *Commonwealth Coatings,* one of the triers of fact had continuing business relations which gave rise to reason to question his impartiality. The judge simply accepted the juror's assertion that he could be fair, and the Court of Appeals affirmed, dis-

tinguishing *Commonwealth Coatings* on the ground that "all that [case] requires is a disclosure of these dealings. In the present case, the nature and extent of the juror's business contacts were disclosed and the District Court . . . concluded that he could impartially hear the evidence . . . ." (44a), 434 F.2d at 792. But the thrust of *Commonwealth Coatings* and its reading of *Tumey* obviously is not limited to disclosure. The reason for disclosure is to permit challenge where the possibility of a pecuniary interest raises any question at all about the integrity of the adjudicative process. The Sixth Circuit's cramped reading of this Court's mandate seriously undermined the administration of justice and the vital appearance of justice as well.

During the course of the trial there were two incidents of juror misconduct, one involving the very same juror unsuccessfully challenged for cause, which raised further questions concerning the integrity of the proceedings. The challenged juror discussed the case with an attorney who had represented South-East Coal Co. and who was involved in antitrust litigation for a coal company. And two other jurors had a lengthy and friendly conversation with the president of the plaintiff corporation, who took a seat next to them in a restaurant where numerous other seats were available. In refusing to act on either of these matters, the lower courts ignored this Court's express mandate that

> Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Mattox v. *United States, supra* at 150.

The attempt by the plaintiff's president, as the District Court put it, to "curry favor" with the two jurors (J.A. 1036), even if it was unintentional, injected the grave possibility of prejudice into the proceedings. The District Court excused the matter on the ground that the case was not discussed. This was clearly irrelevant. *Pekar* v. *United States,* 315 F.2d 319 (5th Cir. 1963).

The ruling of the Sixth Circuit on the matter is in conflict with that of the Fifth Circuit in *United States* v. *Harry Barfield Co.,* 359 F.2d 120 (5th Cir. 1966). There the contact was much briefer, consisting merely of a conversation about the party's wife in the course of an elevator ride in the court house. The court held:

> Our system of trial by jury presupposes that the jurors be accorded a virtual vacuum where they are exposed only to those matters which the presiding judge deems proper for their consideration. This protection and safeguard must remain inviolate if trial by jury is to remain a viable aspect of our system of jurisprudence. Any conduct which gives rise to an appearance of evil must be scrupulously avoided. What occurred in this case exceeded the bounds of propriety and will not do.

Id. at 124.

The Sixth Circuit sought to distinguish *Barfield* on the ground that in that case the party to the lawsuit spoke first, while here Mr. LaViers merely sought to avoid rudeness. But this ignores the admission of Mr. LaViers that other seats in the restaurant were available, and the fact that the conversation here was much more extended than that in *Barfield.* Moreover, the question of who initiated contact has little to do with

whether the rapport established by the contact between a juror and a party undermines the integrity of the fact-finding process.

Even more fundamentally erroneous was the refusal of the District Court to allow any inquiry into the circumstances of the juror's conversation concerning the case with a lawyer for coal interests. The known facts raised serious questions which only discovery of the details of the conversation could have put to rest. Where inquiry into the impartiality of the trier of fact is shut off, neither the appearance nor the reality of justice can be preserved.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED:
March 18, 1971

APPENDIX

No. 19622
No. 19623

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19,622

SOUTH-EAST COAL COMPANY, *Plaintiff-Appellee,*

v.

CONSOLIDATION COAL COMPANY, *Defendant-Appellant.*

No. 19,623

SOUTH-EAST COAL COMPANY, *Plaintiff-Appellee,*

v.

UNITED MINE WORKERS OF AMERICA, *Defendant-Appellant.*

Appeals from the United States District Court for the Eastern District of Kentucky.

Decided and Filed November 18, 1970.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and BROOKS, Circuit Judges.

BROOKS, Circuit Judge. These are appeals by defendants-appellants, United Mine Workers of America (UMW or Union) and Consolidation Coal Company (Consol or Consolidation),[1] from a jury verdict imposing civil liability for

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[1] In this action, unlike the situation which existed in *Ramsey* v. *United Mine Workers of America*, 416 F.2d 655 (6th Cir. 1969), a coal company which allegedly conspired with the Union to restrain trade was made a codefendant.

alleged violation of Sections 1 and 2 of the Sherman Anti-Trust Act (15 U.S.C. §§ 1 and 2). Plaintiff, South-East Coal Company (South-East), contended that a conspiracy to restrain trade existed between UMW, Consol and other large coal companies and the Bituminous Coal Operators Association (BCOA) which was designed to force South-East and other small coal producers in Eastern Kentucky out of the bituminous coal business. After a trial lasting six weeks the jury returned a verdict for plaintiff, South-East Coal Company, in the amount of $2,410,452. This amount was tripled ($7,231,356) as required by 15 U.S.C. § 15, and attorneys' fees of $335,000 were allowed, bringing the total judgment to $7,566,356. We affirm.

On numerous occasions this Court has considered similar alleged conspiracies between the UMW and large bituminous coal producers and for a general explanation and description of the nature of the contended conspiracy in this case, the following cases are particularly illuminating. *United Mine Workers* v. *Pennington*, 381 U.S. 657 at 664 (1965); *Tennessee Consolidated Coal Company* v. *United Mine Workers*, 416 F.2d 1192 at 1193 (6th Cir. 1969); *Ramsey* v. *United Mine Workers*, 265 F. Supp. 388 at 392, 393 (E.D. Tenn. 1967); *Pennington* v. *United Mine Workers*, 325 F.2d 804 at 806, 807 (6th Cir. 1963).

While recognizing that the present case is factually distinguishable from these cited cases[2] and that differing proof was employed by the plaintiff, South-East, in attempting to establish the existence of this conspiracy, this opinion would, however, be unduly lengthened by an elaborate discussion of plaintiff's case and proof. Therefore, the specific and unique facts involved in this case which bear on issues raised on this appeal will be considered in conjunction with

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[2] A notable difference is that, unlike in the cases cited above, there is in the present case no contention made that the alleged conspiracy attempted to affect or manipulate coal prices in the T.W.A. bituminous coal market.

those issues. Both appellants have taken issue with certain conduct at trial which allegedly prejudiced them jointly, and these issues will be consolidated for consideration. Issues raised by appellants which explore alleged errors having only singular significance will be dealt with individually.

I. Alleged Errors in Instructions

A. The Standard of Proof Required to Impose Liability

Consol and the Union argue that the District Court erred in its charge to the jury on the necessary degree or standard of proof which plaintiff must meet in order for the jury to conclude that appellants violated the Sherman Act. The Union, relying upon *Lewis* v. *Pennington*, 400 F.2d 806 (6th Cir. 1968)[3] and *Ramsey* v. *United Mine Workers*, 416 F.2d 655 (6th Cir. 1969),[4] contends that the District Court did not

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[3] The *Lewis* v. *Pennington* case has a rather involved history. This Court first affirmed the District Court holding against UMW in *Pennington* v. *UMW*, 325 F.2d 804 (6th Cir. 1963). The Supreme Court agreed that the Union's exemption from the antitrust laws did not apply in this situation but reversed on other grounds. *Pennington* v. *UMW*, 381 U. S. 657 (1965). On retrial in *Lewis* v. *Pennington*, 257 F.Supp. 815 (1966), the District Court found in favor of the Union reasoning that plaintiff failed to demonstrate by "clear proof" any violation of the antitrust laws. This Court in *Lewis* v. *Pennington*, 400 F.2d 806 (6th Cir. 1968) affirmed the District Court. (Before Judges Edwards, Peck and Combs, per J. Edwards). Certiorari was denied by the Supreme Court in 393 U.S. 983 (1968).

[4] In *Ramsey* v. *UMW* this Court sat en banc. This was an appeal from the District Court ruling dismissing the action, 265 F.Supp. 388 (1967), because plaintiffs could not show an antitrust violation on the part of the Union by "clear proof", although by the ordinary standard of preponderance of the evidence the Court suggested that liability might be imposed upon the Union. A three-judge panel of this Court heard this appeal on April 8, 1969. Rehearing en banc was granted and that opinion appears at 416 F.2d 655 (6th Cir. 1969), Chief Judge Phillips and Judges Edwards, Peck and Combs for affirming; opinion by Judge Edwards. Judges Weick, O'Sullivan, Celebrezze and McCree for reversing;

adequately or accurately instruct the jury that to impose liability on the Union every essential element of the violation, except damages, must be established by "clear proof".[5]

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opinion by Judge O'Sullivan. Certiorari was granted by the Supreme Court, — U.S. — (March —, 1970).

One week before the en banc hearing in *Ramsey*, a panel composed of Judges Weick, Peck and Combs (opinion by Judge Weick) in *Tennessee Consolidated Coal Company* v. *UMW*, 416 F.2d 1192 (1969) affirmed the jury finding of liability of the union for an antitrust violation. (The West Kentucky Coal Company which was joined as a defendant because it was an alleged coconspirator of the union was voluntarily non-suited. Thus, here again we had only the union being sued.) This Court observed regarding the District Court's instructions that the Union was given the benefit of a more stringent standard of proof by the fashion in which the District Court instructed the jury on "clear proof" and, therefore, was not prejudiced by the instructions even if they were incorrect. The Court made the following remark respecting Section 6 of the Norris-LaGuardia Act: "Section 6 does provide that participation, authorization or ratification must be shown by clear proof. Section 6 does not state that the unlawful acts must be shown by clear proof." Judges Peck and Combs were among the judges in the divided court in *Ramsey*, *supra*, which there held that all elements of the antitrust violation except damages must be shown by clear proof. Judge Weick, author of the opinion in *Tennessee Consolidated Coal*, joined those judges in *Ramsey* who felt that only the authorization, participation or ratification by the Union of the unlawful acts need be shown by clear proof. Certiorari in *Tennessee Consolidated Coal* was denied by the Supreme Court, 38 U.S.L.W. 3335, 3342 (March 3, 1970).

[5] The District Court gave an instruction on proof by a preponderance of the evidence, see *infra* p. 14. However, in its supplemental instructions to the jury, the Court gave the following charge on "clear proof":

> "Members of the jury, the Court has already charged you that the issue of alleged conspiracy in this case must be decided upon clear proof, that is, the plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal, and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof. I want to give you that

Consol joins in and maintains that it too should get the benefit of this more stringent standard of proof. This Circuit is somewhat in disagreement as to the proper degree of proof required to hold a labor union liable for violating the Sherman Act. In the en banc hearing in *Ramsey* v. *United Mine Workers, supra,* the Court divided evenly on the issue. Four judges held that to impose liability on a labor union for a Sherman Act violation Section 6 of the Norris-LaGuardia Act[6] requires that every element of the unlawful act except damages be shown by "clear proof". Four judges construed this section of the Norris-LaGuardia Act to provide that the "clear proof" standard applied only in proving that the Union participated in, authorized or ratified the unlawful acts of its officers with actual knowledge. They concluded that after this was shown by "clear proof" the remaining elements of the antitrust violation—formation of the antitrust conspiracy, the unlawful acts, causation and damages, and all the other elements--required proof only by a preponderance of the evidence.

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additional instruction as a definition for one of the terms I used in my charge."

Thus, the District Court did charge the jury that "clear proof" of participation, authorization or ratification of the alleged conspiracy by the defendants was necessary to hold them liable. While it is concluded that the "clear proof" standard is applicable only in holding a union ratified or authorized the acts of its officials, the District Court's instruction even if erroneous gave both defendants the benefit of a more stringent burden of proof for finding them liable.

[6] Section 6 of the Act (29 U.S.C. § 106) provides:

"No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Because a major coal company has been named a defendant as a coconspirator with the UMW in this antitrust case, a unique problem is presented with respect to the standard of proof question. That problem is what standard of proof must be met by the plaintiff to hold a company liable for an antitrust violation if it conspired with a labor union. If it is assumed that the correct standard of proof to be applied in holding a labor union civilly liable for a Sherman Act violation is "clear proof" of all essential elements, the question then is: "Should a company which is fortuitously joined as a coconspirator of a labor union in an antitrust case get the benefit of the stricter standard of proof afforded the union?" There is no basis in either the Sherman Act or the Norris-LaGuardia Act to indicate that to impose liability on a company, named as a coconspirator of a labor union for an antitrust violation, anything more than a preponderance of the evidence is necessary. To hold that a company should get the benefit of this more strict standard, simply because it was named with a labor union as a coconspirator in a scheme to restrain trade, would be to grant such a company a more advantageous position than other companies would have, which might violate the antitrust laws but are not joined with a union. The law does not provide such an arbitrary advantage. The standard of proof applicable to a company in attempting to show it violated the antitrust laws, regardless of whether it is joined as a coconspirator with a labor union, is the preponderance of the evidence. *Bigelow* v. *RKO Pictures,* 150 F.2d 877, 883 (7th Cir. 1945); reversed on other grounds, 327 U.S. 251 (1946).

Having concluded that the standard of proof needed to be met to hold a company civilly liable for an antitrust violation is preponderance of the evidence, another legal hurdle is encountered when, as in this case, a company is joined as a coconspirator with a union. Again, assume that the correct standard of proof applicable to a labor union under these circumstances is "clear proof". Hypothetically, a

situation could exist where only a union and a single company have conspired to restrain trade. Suppose that in this hypothetical case it could be shown by a preponderance of the evidence that the company did conspire to violate the antitrust laws, however, while a preponderance of the evidence also showed the union conspired, it could not be shown by "clear proof". Therefore, the union would be exonerated and, by force of the fact that a Sherman Act violation is an actionable wrong only when committed under an unlawful conspiracy by two or more, the company would also escape liability. *United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1940); *Standard Oil Company of California* v. *Moore*, 251 F.2d 188 (9th Cir. 1957), cert. denied, 356 U.S. 975. Thus, the company by indirect method would have received the benefit of the more strict standard of proof. While the chances of a situation as this occurring are perhaps remote, this explains the type of problem which may result when parties to an actionable wrong like conspiracy have their respective ultimate liabilities gauged by different standards of proof.

This leads to the question of whether all essential elements of an alleged antitrust conspiracy against a labor union must be shown by "clear proof". The en banc decision of this Court in *Ramsey* did not resolve this controversy. Without a repetitive discussion of the rationale behind this panel's conclusion on this issue, already extensively explored in Judge O'Sullivan's opinion in *Ramsey*, it is concluded that while "clear proof" is necessary to show that the Union participated, authorized, or ratified the acts of its officers, the essential elements of the conspiracy necessary to resolve the ultimate issue of liability need be shown only by a preponderance of the evidence. (See n. 4). The jury charge on the standard of proof issue could have been more clear, however, the parties were given the benefit of a partial instruction which was more stringent than required by this Court's conclusion on what is the proper

standard of proof.[7] Thus, the parties were not prejudiced by the instruction even if it was erroneous.

B. The Reasonableness of the Restraint

UMW and Consol claim they were prejudiced by the absence of an instruction to the jury that only undue or unreasonable restraints of trade or competition are grounds for finding a Sherman Act violation. Usually, to find that a violation of the Sherman Act has occurred, the restraint of trade or competition resulting from certain acts committed by the accused parties must be "unreasonable". See generally, *Standard Oil Company* v. *United States*, 221 U.S. 1 (1911); *Apex Hosiery Company* v. *Leader*, 310 U.S. 469 (1940); *Lewis* v. *Pennington*, *supra*. However, there are several types of restraints of trade which are per se unreasonable. See e.g., *United States* v. *Trenton Potteries Company*, 273 U.S. 392 (1927); *United States* v. *Socony-Vacuum Oil Company, Inc.*, *supra*; *United States* v. *Consolidated Laundries Corporation*, 291 F.2d 563 (2nd Cir. 1961). Other restraints, while reasonable on their face, become unreasonable when they are accompanied with a specific intent to accomplish a forbidden restraint. *United States* v. *Columbia Steel Company*, 334 U.S. 492 (1948).

In *United Mine Workers* v. *Pennington*, *supra*, an alleged conspiracy existed which had as part of its purpose the identical objective that plaintiff, South-East contends was the object of this particular conspiracy. That is, that the "union entered into a conspiracy with the large operators to impose the agreed-upon wages and royalty scales upon the smaller, non-union operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and pre-empting the market for the large union-

[7] See n. 5, supra.

ized operators." Respecting this type of conspiracy the Supreme Court observed at 381 U.S. 665, 666:

> "[A] union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior (Footnote omitted). But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."

The Supreme Court then made the following analogy:

> "One could hardly contend, for example, that one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers, or a system of computing wages that, because of differences in methods of production, would be more costly to one set of employers than to another. The anticompetitive potential of such a combination is obvious, but is little more severe than what is alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry." 381 U.S. at 668.

The conclusion which can be drawn from this language is that when a labor union and an employer enter into a plan or scheme of the type which results in the union losing its exemption from liability under the antitrust law, that plan or scheme is by definition an unreasonable restraint

under the antitrust laws. [But see the interpretation given this language by Judge Peck in *Lewis* v. *Pennington,* 400 F.2d 806, 813-814 (1968) and by District Judge Wilson in *Ramsey* v. *United Mine Workers,* 265 F.Supp. 388, 399 (1967)]. Thus, if it could be shown that in this case the Union entered into a conspiracy with certain large coal operators to impose agreed upon wages and royalties upon smaller, non-union coal producers, regardless of their ability to pay and regardless of whether or not the Union represented the employees of these smaller companies, all for the avowed purpose of eliminating them from the business, limiting production and pre-empting the market for the larger, unionized coal producers, this conspiracy would be a per se unreasonable restraint of trade or competition. While the District Court did not give an instruction that only undue or unreasonable restraints of trade or competition can be grounds for a jury to conclude that there was an antitrust violation, in light of the conclusion that if the alleged conspiracy in this case was proved, it would be by definition unreasonable, no specific instruction on the reasonableness of the restraint was necessary.

C. Instructions on a Labor Union's Exemption from the Antitrust Laws

The United Mine Workers argue that they were prejudiced by the District Court's failure to give its proffered instruction on a labor union's exemption from the antitrust laws.[8] The District Court gave the following instruc-

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[8] The Union proffered the following instruction:

"3. In Section 6 of the Clayton Act, which amended the Sherman Antitrust Act, Congress declared that 'the labor of a human being is not a commodity or article of commerce nor shall (labor) organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.' The entering into a wage agreement with employers, which is a successful union activity, may have some influence on price competition by eliminating

tions respecting activities of a labor union and their relationship to the antitrust laws:

"Now, the law does not make it unlawful for them to combine for the purpose of making a union for the purpose of protecting their rights and for having a bargaining agent, so you are not to consider because the union is composed of a great many miners, all of the miners in this Eastern Kentucky who are members of it, that of itself is not unlawful. The courts have expressly said so.

"The law has expressly said so in what is known as the LaGuardia Act that was passed by the Congress. That is not unlawful."

* * *

"Then under the national law and under the national policy, the labor laws, as we have produced under what is known as the Labor Act, and the LaGuardia Act and these other Acts of Congress, they were allowed to bargain collectively. They didn't hire one man for so much and another for so much, but the miners and other workers in other industries were allowed to bargain collectively and to select a bargaining agent."

* * *

"A union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own union's interest, seek to obtain the same terms from other employers; but a union forfeits its ex-

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that part of such competition which is based on differences in labor standards. However, a labor union to be effective must eliminate the competition from goods produced under sub-standard labor conditions. The elimination of price competition based on differences in labor standards is a lawful union objective and the effect of such objective on price competition is not violative of the antitrust laws. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503; *UMWA* v. *Pennington*, 381 U.S. 657, 664."

emption from the anti-trust laws when it is clearly shown that it has an agreement with one set of employers to impose a wage scale on the bargaining unit."[9]

"One group of employers may not conspire to eliminate competitors from the industry, and the union is liable with the employers if it becomes a party to the conspiracy.

"This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment for the remaining employees and employer in the industry.

"It is a legitimate aim of any national labor organization to obtain uniformity of labor standards, and it may be a consequence of such union activity to eliminate competition based on difference in such standards.

"This, however, does not mean that the union and the employers in one bargaining unit are free to bargain about wages, hours, and working conditions of other bargaining units or to attempt to settle these matters for the entire industry.

"The union has a duty to bargain unit by unit in order to best serve its obligations to its members.

"The Union should retain the ability to respond to each bargaining situation as the individual circumstances might warrant without being straight-jacketed by some prior agreement with favored employers."

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[9] The correct statement per *Pennington* is "a certain wage scale on other bargaining units." Apparently, this was a misspoken phrase, as the District Judge in the remainder of the charge more than adequately conveys the idea that the disallowed conduct is when an employer (or a multi-employer bargaining unit) combines with a labor union to impose certain labor standards or conditions on other bargaining units or employers.

These instructions, portions of which are taken from *UMW* v. *Pennington,* 381 U.S. 657 (1965), adequately explained to the jury what types of conduct a labor union may engage in without fear of antitrust violation repercussion. The instructions also advised the jury under what circumstances otherwise lawful union activity would result in an antitrust violation. See generally, *Allen Bradley Company* v. *Local Union No. 3, International Brotherhood of Electrical Workers,* 325 U.S. 797 (1945); *United States* v. *Hutcheson,* 312 U.S. 219 (1941); *Ramsey* v. *United Mine Workers, supra.* The Union complains that the expression "exemption" was only used once in the instruction. It is interesting to observe that even in UMW's proffered instruction on this subject (see n. 8) the expression "exemption" was not used. While a party has the right to have his legal claims of defenses stated to the jury by way of instructions, so long as the District Judge accurately states these claims or defenses, there can be no grounds for objection simply because the exact wording or phrasing of the requesting party are not used.

The Union contends that the instructions in this case were as fatal as those given in *Cedar Crest Hats, Inc.* v. *United Hatters, Cap and Millinery Workers International Union,* 362 F.2d 322 (5th Cir. 1966). That suit involved a labor union against whom charges of antitrust violations and unfair labor practices were made. On appeal the union objected to the court's instructions which did not even mention that certain conduct engaged in by a labor union does not fall within the scope of activities violating the antitrust laws. A comparison of the trial court's instruction in that case (appearing at 362 F.2d 322, 325-326) with the instructions given in the instant case, *supra,* respecting a labor union's conduct in regard to the antitrust laws clearly indicates that the instructions in question on this appeal were both correct and fair.

D. Equal Hypothesis Rule

Appellants contend it was error for the District Court not to instruct the jury that "where proven facts give equal support to each of two inconsistent inferences, in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover." *Pennsylvania Railroad Company* v. *Chamberlain,* 288 U.S. 333, 339 (1933). It is argued that such an instruction is a necessary component of the law applicable to circumstantial evidence and was properly given in *Ramsey* v. *United Mine Workers,* 265 F.Supp. 388 at 432 (1967), and *Tennessee Consolidated Coal Company* v. *United Mine Workers* (unreported District Court opinion) and respectively affirmed by this Court in *Ramsey* v. *United Mine Workers,* 416 F.2d 655, 665 (6th Cir. 1969), and *Tennessee Consolidated Coal Company* v. *United Mine Workers,* 416 F.2d 1192, 1202-1203 (6th Cir. 1969).

It appears that the "equal hypothesis rule" is simply a negative way of phrasing the rule of law that a plaintiff must sustain his burden of proof. Thus, if a plaintiff does not come forth with evidence, when considered in light of opposing evidence, from which a jury could infer the truth of an alleged proposition over its contra-proposition, the plaintiff has not met his burden of proof. When there are equal inferences which can be drawn from a particular set of facts—one inference indicating liability, the other non-liability—it is the judge's obligation at the direct verdict stage of the trial to find for the defendant. See *Pennsylvania Railroad Company* v. *Chamberlain, supra; Gulf Refining Company* v. *Mark C. Walker & Son Company,* 124 F.2d 420, 426 (6th Cir. 1942). It would not be proper under these circumstances for the trial judge to relinquish to the jury this responsibility by simply giving them an instruction to the effect that if they could not draw either

an inference of liability or one of non-liability from the facts presented, they should conclude non-liability.[10]

In this case the District Court instructed the jury on the meaning of plaintiff having to sustain the burden of proof by a preponderance of the evidence. He stated:

> "Now, in order to recover, the South-East Coal Company must sustain the burden of proof; in other words, if no proof was offered, there would be no judgment for the plaintiff. It is his responsibility to offer proof to establish the facts that he claims.
>
> "And the defendant has the right, as you have seen here, to offer proof to contradict those facts or to explain those facts or to justify its conduct, which may have been brought out by witnesses for the plaintiff in support of its allegations.
>
> "But it is the responsibility of the plaintiff to sustain this burden of proof. Now, by 'burden of proof,' it doesn't necessarily mean the greater number of witnesses. Sometimes the burden of proof in lawsuits can be sustained by one witness as contrary to fifteen on the other side, and so you are not to confuse the idea of "burden of proof" with numbers of witnesses or numbers of depositions or other articles of evidence that might be offered.

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[10] The *Ramsey* case relied upon by appellants was a non-jury case. On appeal an observation—not an instruction—made by the District Judge in his opinion was quoted with approval. Since the "equal inference" rule or doctrine is used by the trial judge in deciding the question of whether a directed verdict should be granted a defendant because plaintiff has not satisfied his burden of proof, it is both logical and correct that this rule entered the trial judge's thinking in the non-jury trial in *Ramsey*. It is doubtful that the equal inference instruction given in *Tennessee Consolidated* to the jury was correct. However, this apparently was not assigned as error on appeal as no mention whatsoever is made of that instruction or the propriety of its use in the appellate opinion in the case. See *Tennessee Consolidated Coal Company* v. *United Mine Workers,* 416 F.2d 1192 (6th Cir. 1969).

"But it must convince you, before this plaintiff may recover, it must sustain its burden of proof by proving every essential element of the claim, by a preponderance of the evidence.

"Should it fail in its proof, under this rule you should find for the defendant.

"To establish the preponderance of the evidence means to prove that something is more likely so than not so; in other words, the 'preponderance of the evidence' means such evidence, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely to be true than not true."

These instructions explained what South-East had to prove and to what degree the jury must be convinced of the truth of South-East's assertions. It was not error for the District Court to refuse to give the "equal hypothesis" instruction requested by appellants.

E. Instructions Respecting the Use to be Made by the Jury of Certain Hearsay Statements

Consolidation raises as error the District Court's refusal to give a concluding instruction to the jury regarding the permissive use of certain statements which were competent evidence as against the Union but were hearsay as applied to Consolidation. The rejected instruction stated in part that:

"During the trial the Court has permitted the introduction of evidence concerning the actions and statements of each of the defendants with specific admonition to the jury, however, that the members of the jury must not consider that evidence against the other defendants. . . . Inasmuch as there can be no liability on the part of the defendants unless a con-

> spiracy is (proven) . . . you must disregard all of such evidence unless you first find by other and disassociated evidence in the case sufficient . . . proof that the conspiracy claimed by plaintiff existed. In such event you may then consider the evidence subject to the admonition in concert with all the other evidence in the case."

A requested instruction similar to this was not given in *Schmeller* v. *United States,* 143 F.2d 544, 550 (6th Cir. 1944), and it was held reversible error. This case lends the strongest support for Consolidation's position. However, since the *Schmeller* case was decided, the logic and correctness of a jury charge that instructs that certain hearsay statements as to one defendant cannot be used by the jury in determining whether a conspiracy exists between defendants until the jury has first concluded that the defendants are guilty of an unlawful conspiracy, has apparently been seriously challenged. In addition, appellants' reliance on *Schmeller* is not entirely appropriate as part of the reason the Court found error in the refusal to give the instruction was that there were both substantive charges and a conspiracy charge involved. In the instant case we are dealing only with a conspiracy charge. In *Carbo* v. *United States,* 314 F.2d 718, 736 (9th Cir. 1963), an instruction almost identical to that offered by Consolidation in this case was held to have been properly rejected as not a correct statement of the law. The Court in *Carbo* observed:

> "The situation is rendered confusing by the fact that the admissibility of this evidence (concededly relevant but challenged under a technical evidentiary rule of competence) depends upon a disputed preliminary question of fact which coincides with the ultimate jury question upon the merits. (Footnote omitted). The declarations are admissible against the defendants if they are co-conspirators. If they are co-conspirators,

> they are guilty. The problem presented to us is whether the preliminary question (upon the resolution of which only independent evidence is available) is to be resolved by the jury or by the judge. Appellants' view of the law [which, except for the standard of proof is identical to that asserted by Consolidation] . . . is that the preliminary question is to be resolved by the jury upon proof beyond a reasonable doubt.
>
> "Yet if by independent evidence the defendant's position as a co-conspirator is to be established by the jury upon their judgment beyond a reasonable doubt, there is no occasion ever to resort to the declaration at all. The district court in effect will have told the jury, 'You may not consider this evidence unless you first find the defendant guilty.' " [Bracketed explanation is this Court's].

While *Carbo* and many of the cases which have dealt with this problem are criminal in nature, therefore requiring the jury to conclude the existence of a conspiracy beyond a reasonable doubt, the paradox of instructing a jury that certain statements can be used to establish a conspiracy only after they have already found the conspiracy to exist is just as illogical in civil cases, although a lesser standard of proof is required. Thus, it is concluded that the preliminary question of the admissibility of evidence challenged under this technical evidentiary rule (this is clearly a question of admissibility and not of sufficiency or weight of the evidence, *Wong Sun* v. *United States*, 371 U.S. 471 (1962)) is a matter for the judge not the jury to decide and, therefore, the instruction was properly rejected by the District Court. We deal here only with the propriety, as a legal matter, of the District Court's refusal to give Consolidation's proposed instruction, and the question of whether the Court erred in admitting these statements because no prima facie case was established will be considered later, *infra.*, see pp. 33-34.

F. Instructions Respecting the Protective Wage Clause and "80-Cent Clause" in the National Agreement

Alleged errors in the District Court's instruction regarding the Protective Wage Clause (PWC) [11] and the "80-cent clause" [12] presents a legal problem the resolution of

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[11] See *Ramsey* v. *United Mine Workers*, 416 F.2d 655 and *Tennessee Consolidated Coal Company* v. *United Mine Workers*, 416 F.2d 1192 for a discussion of the PWC and the complete text of the clause.

[12] The "80-cent clause" of the National Agreement provided:

"UNITED MINE WORKERS OF AMERICA

WELFARE AND RETIREMENT FUND OF 1950 (As Amended)

"Amend the first printed paragraph of subsection A of this clause by striking out all of the second sentence beginning with the word 'During' and ending after the word 'sale' and inserting in lieu thereof the following: 'During the life of this agreement there shall be paid into such Fund by each operator signatory hereto the sum of forty cents (40 cents) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of (80 cents) per ton of two thousand (2,000) pounds on each ton of such bituminus coal so procured or acquired on which the aforesaid sum of forty cents (40 cents) per ton had not been paid into said Fund prior to such procurement or acquisition. The parties hereto mutually agree that, if at any time during the term of this agreement a court or tribunal of competent jurisdiction determines by final decision that the provision appearing in the sentence just preceding, providing for the payment by signatory operators of eighty cents (80 cents) per ton under certain prescribed conditions, is invalid or in violation of the National Labor Relations Act, as amended, or other federal or state law, the parties shall, at the option of and upon demand by party of the second part, without affecting the integrity of any

which may be helped by a brief discussion of the clauses and the role they played in the various national labor agreements in which they appeared. The National Bituminuous Coal Wage Agreement entered into between the Bituminous Coal Operators Association (BCOA) and the United Mine Workers in 1950 was amended in 1958 thereby incorporating the Protective Wage Clause. The arrangement provided by the clause was that the United Mine Workers agreed, as bargaining agent for the employees covered by the contract (members of the UMW), that while the contract was in effect it would not enter into, or be a party to any agreement covering wages or working conditions which were not on an equal basis with those provisions contained in this contract. In return for this commitment, the coal producing signatories to the National Agreement (BCOA members) agreed "that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this contract."

The "80-cent clause" of 1964 amended the Welfare and Retirement Fund provisions of the 1950 National Agreement. The Protective Wage Clause was dropped from the Agreement in that year. Until this amendment went into effect signatories to the National Agreement had to pay into the Welfare Fund forty cents per ton of coal they produced. The purpose of the amendment was to obligate signatories who procured or acquired bituminous coal for sale or use which was not produced under an agreement requiring the paying of forty cents per ton into the Wel-

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other provision of this section or any other provision of the National Bituminous Coal Wage Agreement, meet and engage in good faith negotiations to agree upon a clause to be inserted into this agreement in replacement of the provisions found invalid or unlawful.' "

fare Fund (non-UMW produced coal) to pay eighty cents into the Welfare Fund for each ton of coal so procured. While the stated purpose of the amendment was to protect work standards by equalizing labor costs between employees of signatories and non-signatories, the obvious effect was to discourage signatories from purchasing or acting as sale agents for coal companies which produced coal with non-UMW laborers.

The legality of the Protective Wage Clause, in terms of the antitrust laws, was considered in the *Ramsey* and *Tennessee Consolidated Coal* cases. In *Ramsey,* responding to allegation that the PWC was a per se violation of the Sherman Act, the Court (all judges concurred in this portion of the opinion) observed that the clause was capable of two opposite constructions. However, the proper interpretation to be given the clause was the one "that does not result in a violation of the law." *Ramsey* at 659. In *Tennessee Consolidated Coal* the jury's general verdict imposing liability on the Union concluded that the PWC required the Union not to bargain with non-signatory operators except upon the terms and conditions of the National Agreement, 416 F.2d 1192, 1197 (6th Cir. 1969). The jury also found in response to special interrogatories that "prior to and apart from" the National Agreement as amended in 1958 the UMW did not conspire with signatory coal operators to impose the terms of the National Agreement on non-signatories. It should be noted that except for several minor alterations in the 1950 National Agreement made by the 1958 amendment, the addition of the Protective Wage Clause by the amendment constituted the major change in the National Agreement. On appeal in *Tennessee Coal,* this Court stated that the contract, the PWC, was ambiguous and that all circumstances surrounding the contract and the practical construction given it by the parties could be used by the jury in determining the meaning of the contract. While it cannot be said with absolute certainty upon which theory or basis the jury chose to

impose liability in the *Tennessee Coal* case, it seems that the jury felt that the PWC was the crux of the Union's illegal conduct.[13]

The legality of the "80-cent clause" in terms of the antitrust laws has not been considered by an appellate court. When the "80-cent clause" was incorporated into the National Agreement, charges that it violated Section 8(e) of the National Labor Relations Act were raised. See *Lewis* v. *National Labor Relations Board,* 350 F.2d 801 (D.C.Cir. 1965); *United Mine Workers* v. *National Labor Relations Board,* 399 F.2d 977 (D.C.Cir. 1968). A final determination of this question has not been made.

Appellants maintain that the instruction with respect to these clauses failed to "adequately or accurately" explain the significance of these provisions and the proper legal interpretation that should be given them. Specifically, they contend that the District Court's instructions were in contradiction in so far as they instructed the jury that the contracts or national agreements containing these clauses were legal, but that they, the jury, could conclude that an antitrust violation occurred if they found that the agreements were entered into with the intention of driving certain coal producers out of business. It is argued that this is paradoxical and that either the agreements were legal or illegal. South-East contends that the instructions were accurate and more than adequate because they admitted the legality of the clauses in the national agreements, but based their claim of antitrust violation on the theory of the existence of an "intentional predatory conspiracy" as developed by Mr. Justice White's opinion in *Pennington.* Neither of these positions is a wholly correct interpretation of the law as stated in *Pennington.*

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[13] The *Tennessee Coal* case was decided a week after the *Ramsey* case. However, it is not clear what effect *Ramsey* has on the findings of the jury in *Tennessee Coal.* Certiorari was denied in *Tennessee Coal* but granted in *Ramsey.*

In *Ramsey* the Supreme Court's decision in *Pennington* was examined with particular attention given to what type of combination or agreement between an employer and a labor union might produce grounds for concluding that an antitrust violation occurred. It was in *Ramsey* that it was decided that "the language of the agreement (PWC) did not per se constitute an illegal conspiracy." In addition, *Pennington* was construed to have held that "a conspiracy between employers and labor formed with the intention of driving competitors out of business is a violation of the Sherman Act" and that " 'predatory intent' (as used by Mr. Justice White, 381 U.S. at 668 . . .) is merely shorthand employed to describe this anti-competitive conspiracy."

Reviewing the Ramsey decision's interpretation of *Pennington,* four conclusions may be drawn applicable to the present dispute. First, the National Agreement containing the Protective Wage Clause is, on its face, a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions. Second, if this agreement was made or entered into by the union in pursuance of its own self interests, there are no grounds for concluding a violation of the antitrust laws. Third, if however the employers and union entered into this contract with the conscious knowledge or intent that it would be used to drive competitors out of business (more than the incidental effects caused by the adoption of a uniform wage agreement which may result in certain operators not being able to function profitably), then a violation of the antitrust laws has occurred. Fourth, it is this either expressly or impliedly agreed-upon use of the valid contract, that is, that it will be used to drive competitors out of business, that comprises the agreement or conspiracy which is illegal for purposes of the antitrust laws. Without deciding the question of the legality of the "80-cent clause" suffice it to be said that these conclusions are also applicable to that provision.

The District Court gave the following instruction with regard to the National Agreement, the nature of an illegal conspiracy and what South-East was required to show before the jury could impose liability on the defendants:

> "In order to establish a conspiracy or unlawful arrangement as claimed by the plaintiff in this case it is not necessary that the plaintiff should offer proof of a direct arrangement or executed written contract that they are entering into a conspiracy.
>
> "It is not necessary that the agreement, if any, was the result of formal action on the part of the defendants. The real question to be determined is whether or not there was a meeting of the minds or a common understanding and purpose in the requirement of the execution of the labor agreement with the intention of doing injury to the plaintiff.
>
> * * * * *
>
> "The thing which you will have to decide and which I will probably refer to again, there is nothing unlawful about that contract in itself; but if it was entered into with the intention on the part of the signatories —the two defendants here—to injure the plaintiff, if they had that in mind, that 'we are going to go into this contract because we know it will put South-East out of business; they can't meet the conditions; we are too big, too strong, and they cannot compete with us, cannot get miners to work for them, and they cannot sell their coal on the market because they do not have sufficient sales agency, so we will deliberately enter into this and they can't meet it; we will thereby profit by putting competitors out of business or seriously hampering his operation.'
>
> "So, the issue is: Did these two signatories have that thing of putting the South-East Coal Company out of business in mind, the time they signed the contract?
>
> * * * * *

"You are instructed that if you believe there was an industry-wide collective bargaining agreement, whereby employers and the union agreed on the wage scale that exceeds the financial ability, of some small operators, including the plaintiff, to pay, and that the agreement was made for the purpose of forcing some employers, including the plaintiff, out of business, or injuring its business, and you believe that the defendants, the Consolidation Coal Company and the United Mine Workers, deliberately entered into and participated in such an arrangement, and that the result of such an arrangement was the sole cause of damage, if any, to the plaintiff, then you will find for the plaintiff.

"If you do not so believe, you will find for the defendants."

It was not necessary for the District Court to go into more detail about the significance of the PWC or the "80-cent clause."[14] The charge properly instructed the

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[14] During closing arguments counsel for UMW objected to certain statements made by counsel for South-East about the National Agreement. The District Court at that time gave further instructions to the jury about the PWC. The colloquy was as follows:

The Court: "As I understand counsel's argument, he is drawing a deduction from these circumstances. He does not argue, and the jury is instructed, if it has been given that impression, that it is not proper.

"There is nothing wrong per se, that is, of itself, with the execution of this contract. I should instruct them on that as a general instruction.

"In other words, you are not to consider that simply because there was an agreement between BCOA and the UMW that that of itself established a violation of the antitrust laws.

"I got the impression that he was using those figures to establish his claim that the results proved the basis on which he relied."

South-East's Counsel: "The circumstances at the time of

jury on the relationship between the National Agreement and the antitrust laws and what must be shown in this regard to impose liability.[15]

G. The Defense of In Pari Delicto Assumption of Risk of the Conspiracy, Waiver of Rights Arising from the Conspiracy and Estoppel.

Appellant Consolidation Coal claims error in the District Court's instruction on its various defenses. Particular emphasis is assigned to the alleged error in the District Court's instruction on the defense of *in pari delicto*. With reference to this defense, the District Court charged the jury that:

> "Now, the defendants here say that, admitting all of these things for the sake of argument, as we put it, whatever damage came to the plaintiff, that he was a part of it.
>
> "He can't claim anything against the coal operators because this arrangement which they had with the UMW had his approval and endorsement, that he was a member of the BCOA—Bituminous Coal Operators Association—that drew up the contract, and that he

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making these contracts, they have got to be used to prove an antitrust claim."

Appellants' Counsel: "I submit to the Court that the same words that were used at the bench as being objectionable were used by this counsel to the same effect, that this jury would have to consider the consequences of this type of bargaining, eliminating from the whole industry certain people and causing a good deal of harm."

The Court: "The jury is instructed that the execution of the contract itself is not per se a violation of law."

Appellants' Counsel: "Okay."

[15] Appellants also claim error in the instruction because of remarks made by the District Judge which were incorrect statements of certain dates involving passage of the PWC and "80-cent clause." In the supplemental instructions the District Judge corrected himself and no prejudice resulted from the error.

was a sponsor of it and, therefore, if he got hurt by it, if it was wrong, he was helping in a wrong, 'impari delicto' (sic) they call it. That is equal guilt.

"A person who is of equal guilt cannot claim that he has been wronged by other people who assisted or collaborated with him on the same project.

"The defendants have entered the defense of 'in pari delicto' — this means that the defendants say that if an unlawful conspiracy existed, plaintiff was equally responsible with defendants in the formation of said conspiracy.

"Under this defense, the Court charges you that if the plaintiff was a co-initiator of the conspiracy and equally responsible therefor, plaintiff is not entitled to recover damages for that period of time that the plaintiff remained a party to the conspiracy.

"Now, a person may be a party to such an arrangement, be 'in pari delicto,' but he can withdraw from that. You are not once brushed with tar that you can't get rid of.

"So, even though you may believe that he did do this, that he was in this arrangement, entered into this contract for the purpose of putting other operators out of business, yet, if you believe that he withdrew from and he got out of it and if you find that the defendants were more responsible than the plaintiff for the formation of the conspiracy, plaintiff may recover, even though it was a party to the conspiracy, even though South-East Coal Company was a party to the conspiracy.

"Even though you may find that plaintiff was a party to the conspiracy and if you find that plaintiff withdrew from the conspiracy and sought to avoid the effects of the conspiracy, it may recover damages arising in the period of the case subsequent to such withdrawal."

This charge more than adequately instructed the jury with respect to the defense of *in pari delicto,* and the effect South-East's participation in the conspiracy would have on the amount of damages recoverable if termination of its part in the conspiracy did not occur. The only difficulty with the instruction is that perhaps it should not have been given at all. Recent cases have tended to indicate that for reasons of public policy the defense of *in pari delicto* is not available to a defendant in certain types of antitrust cases. See *Perma Life Mufflers, Inc. International Parts Corp.,* 392 U.S. 134 (1968); *Gaines* v. *Carrollton Tobacco Board of Trade, Inc.,* 386 F.2d 757 (6th Cir. 1967); *Sahm* v. *V-1 Oil Company,* 402 F.2d 69 (10th Cir. 1968). However, since it has been concluded that the instructions given on this defense were correct, it is not necessary to reach the question of whether the type of antitrust conspiracy involved in this case falls into the category of those antitrust conspiracies in which the defense of *in pari delicto* is available.

Consolidation's request for instructions on its defenses of assumption of risk of the conspiracy, waiver of rights arisng from the conspiracy and estoppel were properly rejected by the District Court. While these defenses might be proper in certain negligence and contract cases, there is no evidence that Congress intended that these defenses could be set up by analogy as a defense in an antitrust case. Furthermore, even if these defenses were available, it appears that they would be subsumed in the more inclusive defense of *in pari delicto.*

H. Instructions Dealing with the Issue of Bad Business Judgment

Consolidation also claims that the District Judge negated one of its primary contentions with certain remarks made in the instructions. The primary contention allegedly negated by the District Judge's statements was that much of the injury South-East sought recovery for did not re-

sult from the anti-trust conspiracy but rather was caused by a "serious mistake in judgment in building a cleaning plant costing $5 million and at a point some one hundred twenty-five miles from the mine . . ." The remarks made by the District Judge concerned only in a very general fashion the importance of a cleaning apparatus in processing bituminous coal and the expensiveness of such a device. There was copious testimony at trial on both sides of the issue of whether the building of the cleaning plant by South-East was or was not a mistake in business judgment. The alleged prejudicial statements on this matter were made at the very beginning of the charge during a general discussion of the bituminous coal industry when the meaning of certain jargonistic words and phrases used in the coal industry and at the trial were explained to the jury. Towards the end of the instructions, the Judge charged the jury on appellant's bad business judgment theory of the cause of South-East's injuries. He stated:

> "The defendants take the position that the (conspiracy did not cause plaintiff's injuries) . . . (but the injuries were) the result of either mismanagement, over expansion, economic conditions, or a combination of these, with possibly other circumstances, to none of which either of these defendants had any part.
>
> "That is the theory of the defendants here, that by building this cleaning plant at Irvine, that there was a significant miscalculation of its cost of construction, more than a million dollars it anticipated to cost; that it was 125 miles in haul from the mines to that plant, which was an additional expense and contrary to good coal production management, and that by loss of the sale of coal through no fault of Consolidation Coal Company, but through the failure of the plaintiff to exercise orthodox business acumen; that is what caused this plaintiff to lose money, and that through its own failures and no reason to accuse either of these defendants to have committed wrongful acts; the financial

problems of the plaintiff arose from its own actions and its own failure to exercise good business judgment in the face of advice on the part of Consolidation Coal Company, according to Mr. Tucker, I believe, who was the witness — is that his name?

Appellants' Counsel: "Cassidy."

The Court: "The last witness who testified. Well, anyway, one of the witnesses for the defendant that he was concerned about the building of this tipple and this cleaning plant, and advised the plaintiff, through its president, Mr. LaViers, and possibly others, that importation from Canada and other places and the use of gas and oil was going to reduce the coal demands thirty-three and a third per cent from locality, or more. Notwithstanding that, this plaintiff proceeded to its development and expansion, and that these defendants were in no way responsible for it. But, due to these circumstances alone, if he had any loss, it was caused by that."

If there was a negation of one of appellant's theories by the passing remarks made by the District Judge at the beginning of the charge to the jury, it obviously was more than compensated for by the explanation of appellant's position just quoted. It is concluded that appellants were not prejudiced by certain complained of statements made by the District Judge in his instructions to the jury.

II. Alleged Errors in Evidentiary Matters

A. Evidence of Effects and Consequences of the Alleged Antitrust Conspiracy

The appellants challenge the District Court's ruling on certain evidence offered by South-East which concerned economic conditions in the coal industry in Eastern Kentucky. The evidence was principally statistical and related to such things as: the reduction in the number of miners

employed in the coal industry, diminution of population in certain coal producing areas, wage scales in the bituminous coal industry, quantitive fluctuations in coal production in various years, income and losses of certain bituminous coal producing companies. The objection raised to this type of evidence was that it inordinately emphasized alleged "effects and consequences" of the antitrust conspiracy, thereby misleading the jury to believe that the existence of an anti-competitive conspiracy or agreement could be inferred from these conditions. It is argued that this Court's decisions in *Lewis* v. *Pennington*, 400 F.2d 806 (6th Cir. 1968), and *Ramsey* v. *United Mine Workers*, 416 F.2d 655 (6th Cir. 1969), and the Supreme Court's decision in *Pennington* v. *United Mine Workers*, 381 U.S. 657 (1965), specifically rejected the theory that an antitrust conspiracy can be proven by effects and consequences. The argument is not clear, but it appears that objection is not made to the admissibility of this type of evidence, rather that this type of evidence standing alone cannot, as a matter of law, serve as the basis for concluding that an antitrust conspiracy exists.

In *Pennington* v. *United Mine Workers* the Supreme Court stated that a labor union, having concluded a wage agreement with one set of employers, may unilaterally seek to impose the same terms on other employers even though it is believed that "[s]ome employers cannot effectively compete if they are required to pay the wage scale demanded by the union." *Pennington* v. *United Mine Workers*, at 655, n.2. It was also observed that "[s]uch union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy." *Pennington* v. *United Mine Workers*, *Id.* The textual material, not the language of the footnote quoted above, appears in *Lewis* v. *Pennington* and *Ramsey* v. *United Mine Workers*. Appellants' argument apparently relies upon the language quoted above from the Supreme Court's *Pennington* decision. They construe this

language to mean that evidence of the effects and consequences of an alleged conspiracy, *e.g.* statistics showing marginal producers are losing money and going out of business, reduction in the number of the individuals employed as coal miners, et cetera, are insufficient to prove an antitrust conspiracy.

It cannot be said definitely that appellants' interpretation of the language in *Pennington* is either right or wrong. While this Court finds it difficult to construe that particular language in *Pennington* as appellants have, some support for appellants' interpretation of that language can be found in Mr. Justice Goldberg's dissenting opinion in *Pennington* appearing in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America* v. *Jewel Tea Company, Inc.*, 381 U.S. 676 (1965) at 714-15. Even though the language in *Pennington* is not decisive, there is a logical basis for appellants' position. The "effects and consequences" theory is basically a causal argument. That is, a cause (the antitrust conspiracy) has produced certain results or effects (reduction in the number of people employed in the mines, financial losses by marginal producers, et cetera.). This type of argument has one chief flaw: The difficulty in isolating a single factor causally responsible for identifiable effects. Often there are intervening and superseding causes which if shown destroy the validity of the argument. The "effects and consequences" theory appellants question appears to simply reverse the usually logical progression from cause to effect by first pointing to certain conditions and then concluding what caused these conditions. In any event, the problem of isolating a particular cause which definitely produced certain effects is still present. The law cannot be that an antitrust conspiracy can be proven by alleged effects and consequences of the conspiracy alone. If the only evidence a plaintiff could produce of an alleged antitrust conspiracy is statistics showing that they and other producers in an industry are losing money while some producers make

money; that overall production in the industry is down while profits of certain companies are up; and that employment has dropped off in the industry, the defendants should have a verdict directed for them at the close of plaintiff's case. Plaintiff would not even have made out a prima facie case for recovery.

Regardless of how accurate these statements might be, they do not apply under the facts of this case. Reviewing the record, it becomes obvious that contrary to appellants' contention South-East's case does not rest solely on alleged effects and consequences to prove the existence of the antitrust conspiracy. South-East presented evidence of statements made by UMW and Consolidation officials tending to show that there existed an implied or expressed agreement between the Union and Consolidation; there was evidence of past courses of dealing and performance between itself and Consolidation which were interrupted or changed as a result of Union activity; there was evidence concerning what happened at bargaining sessions between South-East and the Union which indicated that some agreement other than the National Agreement (the Bituminous Coal Wage Agreement) existed between the Union and certain producers.

While the question of the sufficiency of this evidence will be dealt with later, the importance of indicating that South-East introduced other evidence from which the existence of an agreement to restrain trade or competition could be inferred, is to show that it did not rely solely on alleged effects and consequences of the antitrust conspiracy to prove its claim. If the only evidence South-East introduced was the statistical evidence referred to earlier, then the case should never have been submitted to the jury. However, this was not the only proof they offered. Evidence of the type which appellants object to is admissible and can be considered by the jury in drawing its conclusion on the issue of liability if there is other evidence which supports the claim. See generally, *Local 175 of the Inter-*

national Brotherhood of Electrical Workers v. *United States,* 219 F.2d 431 (6th Cir. 1955); *Standard Oil Company of California* v. *Moore,* 251 F.2d 188 (9th Cir. 1957), cert. denied 356 U.S. 975. Therefore, while appellants' argument might be correct as far as it goes, it does not apply to the facts of this case.

B. Evidence and Statements which Allegedly Personalized South-East Claims Thereby Prejudicing Appellant

Consolidation maintains they were prejudiced because certain evidence admitted and statements made at the trial tended to personalize South-East's claim, that is, gave the impression that it was the claim of the LaViers' family which controls and operates the company. It contended that this left the jury with the idea that this was a David versus Goliath type controversy, with the LaViers family representing the small South-East Coal Company battling the combined giant forces of Consolidation Coal Company and the United Mine Workers of America. Thus, appellants argue that because of this characterization, the jury's sympathies had to lie with the underdog South-East Coal.

South-East Coal Company, for all intents and purposes, is a family-owned and family-run coal company. Mr. Harry LaViers, Senior, and his son, Harry LaViers, Junior, were the controlling forces behind South-East and made the decisions, either good or bad, for the company. The company, compared to Consolidation, is a small producer of coal and its actions are earmarked with the LaViers' name. While there was some personalization of the company's claim by occasional interchanging of the name plaintiff with Harry LaViers, Senior or Junior, this was no more excessive than might be expected under the circumstances. In addition appellants, partially as a result of the defense of *in pari delicto,* tended to contribute to any personalization which may have taken place.

Conceding that some personalization of South-East's claim did occur, it is still difficult to accept appellants'

argument that this converted the dispute into a small company versus large company controversy, or appellants' assumption that a jury's sympathies always rest with the underdog. Without some additional evidence that appellants were in fact prejudiced by these characterizations, the record does not support these assertions, and it is concluded that no injury resulted.

C. Admissibility of Certain Hearsay Statements

During the trial, South-East introduced into evidence portions of answers made by the United Mine Workers to written interrogatories. The Union was asked to admit to the authenticity of certain speeches, editorials and statements made by Union officials which were appended to the Union's answers to the interrogatories, and then parts of these documents were read to the jury. Consolidation objected to and now challenges the admissibility of these statements on the grounds that they were hearsay as against them. (Consol's objection to the District Court's refusal to give its requested instruction on this matter was discussed earlier. See, I. ALLEGED ERRORS IN INSTRUCTIONS: Section *E. Instructions Respecting the Use to be Made by the Jury of Certain Hearsay Statements,* supra, at p. 15). Consol's principal contention is that statements of this type are not to be admitted until "[t]here is independent evidence establishing, prima facie, that such others were members of the conspiracy." *Standard Oil Company* v. *Moore, supra.*

The general rule is that this type of evidence is admissible, however, subject to exclusion if no prima facie case of the existence of the conspiracy is established. The question of conditional admissibility is for the trial judge to determine. *Carbo* v. *United States,* 314 F.2d 718 (9th Cir. 1963). There is no error in conditionally admitting the statements before a prima facie case was established by independent evidence if subsequently such a case is proven, because the trial judge has wide discretion over the order

of proof. *Pennington* v. *United Mine Workers,* 325 F.2d 804, 817 (6th Cir. 1963), reversed on other grounds, 381 U.S. 657 (1965). *Flintkote Company* v. *Lysfjord,* 246 F.2d 368, 378 (9th Cir. 1957), cert. denied, 355 U.S. 835. At the close of plaintiff's case there had been established by independent or disassociated evidence a prima facie case, thus the requirement for having conditionally admitted the statements was met.

D. Sufficiency of the Evidence

Appellants contend that the jury verdict, and the District Court's denial of their motions for directed verdict and judgment notwithstanding the verdict are in error, as the verdict "is not supported by clear evidence, but is contrary to undisputed facts and applicable legal principles." Appellants' argument with regard to the "clear proof" standard has already been discussed. See, I. ALLEGED ERRORS IN INSTRUCTIONS, Section *A. The Standard of Proof Required to Impose Liability, supra,* at pp. 3-7. Furthermore, appellants' arguments on applicable legal principles have also been dealt with See, I. ALLEGED ERRORS IN INSTRUCTIONS, pp. 3-28, and what remains is the issue of sufficiency of the evidence.

In considering the sufficiency of the evidence, little if any advantage would be gained by an itemized review of plaintiff's case. Much of the evidence introduced at trial was similar to that used at the trials in *Tennessee Consolidated Coal* v. *United Mine Workers* and the retrial of the *Pennington* case in *Lewis* v. *Pennington.* Yet there was additional evidence introduced at the trial having particular significance to South-East's claim and which tended to emphasize that South-East's case was unique from either *Tennessee Consolidated Coal* or *Lewis.* (A single example is the evidence of the circumstances surrounding the cancellation of the sales agency contract between Consolidation and South-East in which Consol acted as sales agent for South-East's coal.) While some of the evidence intro-

duced was circumstantial, which in and of itself might not support the jury's verdict, there was also direct evidence which, when coupled with the circumstantial evidence, raised plaintiff's case from one of mere suspicion or conjecture to a level where reasonable minds might have concluded liability upon the part of the appellants. After reviewing the record, it is concluded that there was substantial credible evidence to support the jury's verdict. The District Court's decision on this matter was correct and appellants' motions for directed verdict and judgment notwithstanding the verdict were properly denied.

III. Alleged Irregularities with Respect to the Jury

A. Mr. LaViers' Sr. Conversation with Two Jurymen

Consolidation contends that the District Court committed reversible error in not declaring a mistrial because of a conversation Mr. LaViers, Sr., of South-East Coal, had with two members of the jury outside of court during the trial. The conversation took place in a coffee shop in the hotel where some of the witnesses, jurors, attorneys and parties in the trial were staying. Mr. LaViers was seated by a waitress at a table which was situated next to another table where two jurors were eating breakfast. The District Judge, after examining Mr. LaViers,[16] found that appel-

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[16] The Court made the following examination of Mr. LaViers in ascertaining what took place in the coffee shop:

> (Reporter's note:) "The following occurred at the bench in the immediate presence of counsel and the Court, and in the absence and out of the hearing of the jury:
>
> "The Court: I want to clarify this other situation before we get into anything else. This is out of the presence or hearing of the jurors, at the bench, in connection with the statement made to the Court by Mr. Schmidt, counsel for the defendant Consolidation Coal Company, with reference to two of the jurors, Mr. Hill and Mr. Osborne, who were seen in conversation with Mr. Harry LaViers, Sr., at the Coffee Shop of the

lants were not prejudiced by this unintentional contact and declined to grant a mistrial.

Appellants maintain that the case of *United States* v. *Harry Barfield Company*, 359 F.2d 120 (5th Cir. 1966),

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Phoenix Hotel about 7:30 to 8:00 o'clock this morning, October 11, 1968.

"Now, then, do you want to make any further statement? I am just asking.

Off the record."

(Reporter's note:) "An off-the-record discussion took place at the bench.

"The Court: Come here, Mr. LaViers, please. Mr. LaViers, it has been reported to the Court that this morning in the Coffee Shop at the Phoenix Hotel, you, in the presence of Mr. Schmidt and Mr. Rowntree—

"Mr. Schmidt: Mr. Rowntree was not present.

"The Court: No.

"Mr. Rowntree: As I stated, I was there earlier.

"The Court: Yes. I don't know who else was there. But you were seated near or standing near or in the company—not 'in the company,' I don't want to use that term—but in contact with Mr. Hill and Mr. Osborne, who are members of the jury. Now, do you recall that incident?

"Mr. LaViers, Sr.: Yes, I do, Your Honor.

"The Court: Would you mind stating just what it was?

"Mr. LaViers, Sr.: Yes. Mr. Rowntree had gone down to breakfast prior to my coming down. When I came into the Coffee Shop, I looked for him and found that the table where he was seated only had one chair and I was looking around for some other table to sit at, and the head waitress came and said, 'Well just sit down here'—which was right across the aisle from Mr. Rowntree—and I sat down on the bench and ordered my breakfast.

And Mr. Hill was sitting next to me, and he asked me, he said, 'Do you know Mr. Oscar Evans who lives in Paintsville?'

And I said, 'Well, he doesn't live in Paintsville now; he has gone to Florida—but I do know Mr. Evans.'

And he said, 'Well, I used to board at his house.'

And he said he was quite a character.

And I said, 'Yes, I agree with that,' and, 'I knew him very well.'

And then I believe that part of the breakfast, not the main part, was served, and Mr. Hill then asked me if I knew Mr.

controls, and a mistrial should have been granted on the basis of that authority. Reviewing the decision in *United States* v. *Harry Barfield Company,* it appears that several facts instrumental to that decision are lacking in the present case. In the *Barfield Company* case the prejudicial out-of-court conversation took place in an elevator between the president of the company and two jurors. The president of the company made an effort to approach the jurors

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Nelson Howard who lived in Paintsville; and I said yes, 'I know Mr. Nelson Howard; he came from Gallatin County; he was in the automobile business there and later was in the coal business, I know him.' Mr. Hill said he used to work for him. I said, 'Well, he was quite an aggressive merchant when he was there, he made a lot of money and decided he would go into the farming business and bought a couple of farms down in Bourbon County, and I understand, lost what he had of his investment in these farms.'

I guess the rest of the breakfast was served about that time. I don't recall that there was—there was some gentleman came in on the other side, and they turned to him to speak to him. I don't recall any further conversation.

There was nothing about this lawsuit.

"The Court: Do you want to ask him a question?

"Mr. Schmidt: Mr. LaViers, there were other places to sit down in the Coffee Shop besides next to Mr. Hill and Mr. Osborne when you sat down? Isn't that true?

"Mr. LaViers, Sr.: Well, yes, sir, there are other tables for four and tables for two and the tables at the bench are for two, and the head waitress came along and tossed a menu down and just said, 'Sit down here,' and I sat where she put the menu. I didn't seek out this seat.

"Mr. Schmidt: You saw them sitting there?

"Mr. LaViers, Sr.: Oh, yes, I saw them sitting there.

"Mr. Schmidt: Was it in your mind that, even so, it wouldn't hurt to develop some sort of a social rapport with these gentlemen?

"Mr. LaViers, Sr.: No, Mr. Schmidt, that was not in my mind. I am by nature a person who talks to people in the elevator or wherever it might be, and I would be untruthful and unrealistic if I didn't say I do engage in conversations.

"The Court: How many minutes would be assume, or how much time, I should say, would you assume your conversation

and then "cemented" the contact by volunteering information that his wife and her family dealt with the drug store owned by one of the jurors. The Court observed:

"By way of summation it is clear that the taxpayer president approached the jurors. They did not approach him. He sought to identify with juror Lock-

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or what you stated to the Court, or anything in addition to that, was consumed with either of these men?

"Mr. LaViers, Sr.: Oh, there were snatches of conversation, I imagine about ten or fifteen minutes. I was eating breakfast.

"The Court: That covered the whole period?

"Mr. LaViers, Sr.: Well, not the whole period of breakfast, but the period of the conversation.

"The Court: Do you want to ask him anything further?

"Mr. LaViers, Sr.: Mr. Rowntree has continuously cautioned me about this.

"The Court: Well, you see the point is, I mean, the Court accepts your statement that you didn't say anything about the case.

"Mr. LaViers, Sr.: We didn't talk anything about the case, Your Honor.

"The Court: But, you see, the difficulty is that this more or less currying of favor with a juror—while I realize it isn't currying a favor deliberately—but it has brought questions to people's minds. I realize some people are just naturally friendly, and Kentuckians are just that way—I know them pretty well—but we mustn't do anything like this.

"Mr. LaViers, Sr.: I would be very, very happy to avoid them.

"The Court: The Court is confident that you didn't do anything intentionally. That is the ruling of the Court.

Now, do you have anything you want to ask him?

"Mr. Rowntree: No.

"Mr. Schmidt: May I ask him a question?

"The Court: Yes, sir.

"Mr. Schmidt: Mr. LaViers, you have seen each of those gentlemen sit at the same table every morning?

"Mr. LaViers, Sr.: No, sir, they have not, as far as my knowledge, sat at that same table. They do sit in the Coffee Shop there at various places, but I don't recall seeing them at that particular place, Your Honor."

> hart through the fact of knowing about his drug business. He then sought to cement the identity by giving the juror his wife's name which led to a conversation regarding his wife's family. He apparently also managed to find out that the juror from the radio station had known his brother."

(See the dissenting opinion by Judge Colman in the *Barfield Company* case, at p. 124, questioning the majority's characterization of these facts.)

In the present case Mr. LaViers was seated by a waitress next to the jurors. He did not seek them out. Furthermore, it was a jury who approached Mr. LaViers with a question about whether he knew certain individuals. Obviously, Mr. LaViers could have simply ignored the juror, but the law does not require that when a person becomes a party in a lawsuit that he must renounce all social amenities and rudely ignore people who ask him questions. The juror's questions were answered by Mr. LaViers in a straight-forward polite fashion, without any attempt to ingratiate himself to the juror. There was no discussion of the case. The facts of *Barfield Company* which were of principal significance in that decision are lacking here and the case is clearly distinguishable from the present dispute. While, of course, these types of contacts must be scrupulously avoided if at all possible, the fact that in this case the contacts were brought about by a coincidence of circumstances, there was no intentional "seeking-out," and no discussion of the case occurred, the District Court's denial of the motion for a mistrial was proper and clearly not an abuse of discretion. *United States* v. *Van Buskirk*, 304 F.2d 871 (6th Cir. 1962).

B. Alleged Error in the District Court's Refusal to Declare a Mistrial because of Certain Conduct of a Juror

Appellants contend that they were denied their constitutional right to trial by an impartial jury because the District Court refused to grant a mistrial upon learning of

certain alleged misconduct of a juror. Two matters are alluded to as indicating that the partiality of one juror was questionable. First, an incident occurred during trial which allegedly was misconduct on the part of the juror. An attorney for the Union developed the following facts: the juror and his wife attended a social function in Lexington, Kentucky, during the trial. It appeared that the juror's wife was a sorority sister and close friend of the wife of a lawyer who practiced in the coal mining area of Eastern Kentucky. The juror was also a close friend of the lawyer. These people met at the social function, and the juror mentioned that a third lawyer who practiced in the same coal mining region was an attorney for the Union in the trial in which he was a juror and that this attorney was "a very able lawyer". Then the juror's wife made some comment about the present case being difficult "in following a conspiracy or in following just what they were driving at with all the reading and all." It was not at all clear whether the juror's wife mentioned the word "conspiracy" or not. On these facts a motion was made to subpoena the juror and the people involved in this incident and examine them. The District Court concluded that "nothing (had) been shown here to justify an investigation of this juror" and overruled the motion.

Appellant cites *Mattox* v. *United States*, 146 U.S. 140 (1892), as controlling and requiring that under these circumstances an examination of the juror should have been granted. Under the facts in *Mattox*, it was obvious that an examination of the jurors should have taken place. In that case allegedly a court bailiff, present when the jury was deliberating the verdict in a murder case, stated, so that the members of the jury could hear him, that "this is the third fellow he (the accused) has killed." In addition, during deliberation the jury or part of it was read a newspaper account of the trial that included the following remarks:

> "If he (the accused) is not found guilty of murder he will be a lucky man, for the evidence against him

was very strong, or at least appeared to be to an outsider. The case was given to the jury at noon yesterday, and it was expected that their deliberations would not last an hour before they would return a verdict.

* * *

"It (the evidence) was so strong that the friends of Mattox gave up all hope of any result but conviction.

Under these alleged circumstances, the court should have ordered an examination of the jury to determine the accuracy of the purported misconduct. However, by no stretch of the imagination can it be argued that the facts surrounding the present incident of alleged misconduct approximates those in *Mattox*. While questions of jury improprieties are matters of degree, it cannot be said that the District Court abused its discretion in not ordering an examination of the juror and the other participants in the present incident without further representation or a stronger indication that some misconduct prejudicial to appellants' constitutional right to an impartial trial did in fact occur.

The second matter that appellants point to which they contend shows partiality upon the part of this juror is that his insurance agency underwrote a real estate bond for the son of a former official of and present minor stockholder in South-East Coal Company. The juror was challenged for cause, but the District Court overruled the challenge. The examination of the juror showed that a $5,000 surety bond must be posted with the Commonwealth of Kentucky before a real estate broker can sell real estate. The juror's insurance agency underwrites the bond for the son of a former official and present minor stockholder in the South-East Coal. The bond was first written several years before this litigation was commenced and simply has been renewed each year. Until informed, the juror did not know for a fact if he wrote the bond for the son

or the father and, obviously, knew neither personally. Upon questioning, he stated that the fact he wrote the bond would not affect his judgment in any way. This case is distinguishable from *Commonwealth Coating Corporation* v. *Continental Casualty Company,* 393 U.S. 145 (1968), cited by appellants to support their position that their challenge for cause of this juror should have been granted. In *Commonwealth Coatings* an individual acting as an arbitrator under a private contractual agreement had been an engineering consultant for one of the parties in the dispute and collected over $12,000 in fees in four years. The Supreme Court set aside an award made by the panel of three arbitrators holding that an arbitrator should disclose to the parties any dealings which might create an impression of possible bias. Factually and legally, the present case is different. Here a juror had only remote indirect contact with a party in a lawsuit. Even if the business contacts were more direct, all that *Commonwealth Coatings* requires is a disclosure of these dealings. In the present case, the nature and extent of the juror's business contacts were disclosed and the District Court, upon examination of the juror, concluded that he could impartially hear the evidence and return a verdict free of any prejudice that might result from his business dealings. The District Court's refusal to grant the challenge for cause of this juror was not an abuse of discretion. *Holt* v. *United States,* 218 U.S. 245 (1910); *Cox* v. *General Electric Company,* 302 F.2d 389 (6th Cir. 1962).

IV. Damages

A. The Jury Award of Damages

South-East sought damages allegedly resulting from the anti-competitive conspiracy in this case for a three and one half year period from April 26, 1962, to December 31, 1966. Two methods of computing these damages were

used to arrive at a dollar amount.[17] The first method was a simple comparison between operating profits and losses[18] during the period 1952-1958, an arbitrary base period, with the operating profit and losses for the period South-East sought recovery. A method similar to this was used in determining the antitrust damages in *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 258 (1946), and *Ford Motor Company* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 885-886 (1st Cir. 1966).

The second method was more complex and was designed to meet certain objections appellants had to the first method. This method used various financial and managerial figures for the years 1964 and 1965 for a comparison with similar figures in 1962, 1963 and 1966. Thus, statistics during the actual damages period (1964 and 1965) acted as a basis for computing damages for the entire period. Supporting this theory, South-East introduced six financial exhibits showing, in part: the effects higher mining costs and decreased production in 1962, 1963 and 1966 had on earnings compared to the base years 1964-1965; the effect on earnings of two strikes in 1962-1963 and 1966 as compared with earnings in 1964-1965; lower price realization on coal in 1964-1965 than in the remaining years of the damage period; and the alleged effect the conspiracy had on South-East's price realization per ton of coal compared with the average price realization of

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[17] Computation of injuries by the first method produced a damages figure of $3,082,816. The damages figure produced by the second method was $2,896,713. The jury awarded damages of $2,410,452 or approximately $700,000 less than the damages computed by the first method and $500,000 less than computed by the second method.

[18] Figures reflecting operating profit and losses rather than net income were used because these figures do not include such things as percentage depletion allowances which are treated as return of capital, interest payments (expenses) or income, capital gains and losses and dividend income.

the industry for the period 1962-1965. South-East maintains that by using this approach appellant's challenge to the validity of using figures for 1952-1958 for the comparison, because allegedly during the damage period internal and external economic conditions were less favorable than during 1952-1958, are effectively negated.

Appellants raise numerous issues regarding the validity of South-East's theories of damages. Mention of four of the challenges will give some idea of the general nature of appellant's attacks. Respecting South-East's first method of computing damages, appellants contend that using the profit average of 1952-1958 for the comparison is unfair as "internal and external economic factors", i.e. less favorable mining conditions and a general overall depression in the coal market, varied between the years used as a basis and the actual damages period. The second method is challenged on the grounds that use of new equipment during 1964 invalidates the comparison of the financial and managerial date with the base period 1962-1963. The third objection is that both methods claim losses for Consolidation's refusal to handle South-East's coal and that these losses cannot be recovered from the Union. Finally, appellants complain that South-East's computed losses which were in part a result of its inability to get sufficient railroad cars to ship its coal and, therefore, were in no way attributable to the alleged conspiracy.

It appears that most of appellants' challenges to South-East's claims of damages are directed at the accuracy of the amount of damages and not the fact of damages. There was a general issue raised as to the lack of evidence showing that the proximate cause of Southeast's damages was the conspiracy; that is, the sufficiency of evidence showing the fact of damages. However, reviewing the record, it is clear that there was sufficient credible evidence from which the jury was justified in inferring the necessary causal relation between the conspirators' anti-competitive

conduct and the claimed damage or injury. *Zenith Radio Corporation* v. *Hazeltine*, 395 U.S. 100, 125 (1969). The antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections. See, *Story Parchment Company* v. *Paterson Parchment Company*, 282 U.S. 555 (1931); *Bigelow* v. *RKO Radio Pictures, supra; Zenith Radio Corporation* v. *Hazeltine, supra; Ford Motor Company* v. *Webster's Auto Sales, Inc., supra; Atlas Building Products Company* v. *Diamond Block & Gravel Company*, 269 F.2d 950, 958 (10th Cir. 1959); *North Texas Producers Association* v. *Young*, 308 F.2d 235, 245 (5th Cir. 1962); *Flintkote Company* v. *Lysfjord*, 246 F.2d 368, 392 (9th Cir. 1957).

Appellant's principal grounds for objection to the jury verdict is that internal and external economic conditions and decisions of the management resulted in South-East's losses, and not the conduct of the alleged conspiracy. But the question of whether certain of South-East's losses were attributable to the conspiracy or other economic factors was for the jury's consideration and determination, *Cherokee Laboratories, Inc.* v. *Rotary Drilling Services, Inc.*, 383 F.2d 97, 106 (5th Cir. 1967), cert. denied, 390 U.S. 904; as is the question of the credibility of the witnesses used in showing damages, *Atlas Building Products Company* v. *Diamond Block & Gravel Company, supra* at 959. It is concluded that there was sufficient credible evidence to support the jury's verdict as to the fact of damages and the amount of damages was computed as precisely as capable under the circumstances.

B. Attorneys' Fees

Appellants object to the award of attorneys' fees as unreasonable. A party seeking review of an award of attorneys' fees in an antitrust case has the burden of clearly demonstrating error in the factual basis of the award or an abuse of discretion. See, *Armco Steel Corporation* v.

State of North Dakota, 376 F.2d 206, 213 (8th Cir. 1967); *Twentieth Century Fox Film Corporation* v. *Goldwyn,* 328 F.2d 190, 221 (9th Cir. 1964). In this case appellants have not shown either an error in the factual basis of the award or an abuse of discretion.

The judgment is affirmed.

PHILLIPS, Chief Judge, (Concurring.) I do not interpret the opinion in this case to conflict with the opinion of Judge Edwards, in which I concurred, in *Ramsey* v. *United Mine Workers of America,* 416 F.2d 655 (6th Cir.), cert. granted, 38 U.S.L.W. 3379. I concur in the opinion prepared by Judge Brooks.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 1479

CONSOLIDATION COAL COMPANY - - *Petitioner*,

v.

SOUTH-EAST COAL COMPANY - - - *Respondent*.

NO. 1483

UNITED MINE WORKERS OF AMERICA
- - - - - - - - - - - - - - - *Petitioner*,

v.

SOUTH-EAST COAL COMPANY - - - *Respondent*.

On Petitions for Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTIONAL GROUNDS	2
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT	3
A. This Court Has Laid to Rest All of the Principal Arguments of the Petitioners in Its Decisions in *Allen Bradley Co. v. Local Union*, 325 U.S. 797, *United Mine Workers v. Pennington*, 381 U.S. 657, And *Ramsey v. United Mine Workers*, No. 88, October Term, 1970	33
B. Question No. 1 Raised by UMW is Wrong in Asserting that the Jury was Allowed to Find Liability on the Basis of an Agreement by the Union With One Group of Employers to Impose Wage Terms on Competing Companies Without a Specific Finding that the Arrangement was Deliberately Made After a Meeting of Minds to Drive the Competitors Out of Business	33
C. UMW's Second Question and Consol's Second Ouestion are Wrong in Contending that the Jury was Charged It Could Find Liability Without Finding an Intentionally Predatory Conspiracy	40
D. UMW's First Question and Consol's First Question are Wrong in Contending that an Intentionally Predatory Conspiracy Between A Union and Business Groups to Destroy Competition May Merely Forfeit Antitrust	

Exemption Without Establishing Liability to an Injured Competitor 42

E. The Reliance by Consol Under Its Third Question Upon the *Noerr* and *Pennington* Doctrine Protecting the Right to Petition is Clearly Misplaced 43

F. Consol's Contention Under Its Question No. 4 and UMW's Contention Under Its Question No. 3 that the Trial Court Failed to Give a Charge Under the Clear Proof Rule Adequate to Protect the Rights of Both Defendants is Without Basis in Fact. The Trial Court Gave Both Defendants the Benefit of a Generous Instruction Under the Clear Proof Rule of the Kind They Themselves Requested 45

G. The Court of Appeals Has Correctly and Fully Answered All of the Contentions Raised by the Fifth Question in Consol's Petition and the Fourth Question in UMW's Petition Concerning Alleged Irregularity in Procedure in the District Court 47

1. It Was Not Error to Allow Proof of the Effects of Defendants' Conduct 47

2. The Defendants Were Protected as to Alleged Hearsay Evidence 49

3. The Jury Charge was Proper Without Including the "Equal Hypothesis Rule". 50

4. The Evidence was Sufficient to Support the Verdict 50

5. There Were No Irregularities Pertaining to the Jury That Prejudiced the Defendants 50

6. The Jury Charge was not Generally Inadequate or Prejudicial 51

CONCLUSION 53

TABLE OF AUTHORITIES

Cases:

Allen Bradley Co. v. Local Union, 325 U.S. 797 (1945) 4,33

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 44

Blue Diamond Coal Co. v. United Mine Workers, Civil Docket No. 6189, USDC E. Tenn., Northern Division (1970) 4

Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 16,48

Eastern Railroad Conference v. Noerr Motors, 365 U.S. 127 43

Interstate Circuit v. United States, 306 U.S. 208 (1939) 41

Lewis v. Pennington ("*Second Pennington*"), 400 F.2d 806 (6th Cir. 1968) *cert. denied*, 393 U.S. 983 (1968) 5,44,48

Perma-Life Mufflers, Inc. v. International Parts, Inc., 392 U.S. 134 (1968) 15

Ramsey v. United Mine Workers, 265 F. Supp. 388 (E.D. Tenn. 1967), *affirmed by equally divided Court*, 416 F.2d 655 (6th Cir. 1969); *reversed and remanded*, ... U.S. ... (No. 88, Oct. Term 1970) 4, 5, 6, 8, 16, 33

Reliable Volkswagon S & S Co. v. World-Wide Parts Corp., 182 F. Supp. 412 (D.N.J., 1960) 48

Tennessee Consolidated Coal Co. v. United Mine Workers, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970) 4, 6

United Mine Workers v. Pennington ("*First Pennington*"), 381 U.S. 657 (1965) 3, 4, 33, 43, 44, 48

United States v. Reading Co., 226 U.S. 324 (1912) 44

TEXTS

49 Federal Practice Digest, Trials, Section 295(a)..... 53

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 1479

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

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Respondent.

NO. 1483

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v.

SOUTH-EAST COAL COMPANY,
Respondent.

On Petitions for Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Petitions correctly state that the opinion of the Sixth Circuit in these two (2) cases is reported in 434 F.2d 767.

JURISDICTIONAL GROUNDS

The Petitions correctly show that this is a Sherman Act case based on 15 U.S.C. Sections 1, 2 and 15, and this Court has jurisdiction under 28 U.S.C. Section 1254(1).

COUNTERSTATEMENT OF THE CASE

A. THE NATURE OF THE ACTION.

Respondent, South-East Coal Company (South-East), a producer and seller of bituminous coal in Eastern Kentucky, brought this case in the United States District Court for the Eastern District of Kentucky, Lexington, against petitioners, United Mine Workers of America (UMW), an international labor union, and Consolidation Coal Company (Consol), the largest producer and seller of bituminous coal in the country, operating in a number of states, its principal office being in Pittsburgh, Pennsylvania. The suit is based on the Sherman and Clayton Acts (15 U.S.C. §§1, 2 and 15).

Briefly, South-East charged that petitioners and the Bituminous Coal Operators Association (BCOA), which was organized by Consol in 1950, and others engaged in an unlawful conspiracy in the period of this case (1962-1966) to eliminate and suppress competition and production of all but the largest companies in the coal industry. The plan of the conspiracy was that only the coal operators who signed and complied with the National Bituminous Coal Wage Agreement of 1950 as amended (NBCWA), including the 1958 Supplement containing the Protective Wage Clause (PWC), and the later supplements which contained the 80¢ Welfare Clause, would be permitted to carry on operations. It was alleged that the smaller companies or companies not operating in ideal working conditions could not operate profitably under the provisions of the National Agreement;

that those who did not sign were not permitted to operate, and were forced out of business; and that plaintiff was damaged as a result of the conspiracy. It was further charged that, pursuant to said conspiracy, Consol boycotted South-East coal and deprived South-East of its customary markets, and UMW induced two long and damaging work stoppages at South-East's mine and cleaning plant.

B. THE TRIAL COURT CHARGED THE JURY THAT DEFENDANTS WERE NOT LIABLE UNLESS IT WAS FOUND THAT DEFENDANTS WERE ENGAGED IN AN INTENTIONALLY PREDATORY CONSPIRACY UNDER WHICH THE NATIONAL CONTRACTING ARRANGEMENT WAS BEING USED FOR THE PURPOSE OF DRIVING THE SMALLER COMPETITORS OUT OF THE INDUSTRY.

The Trial Court in this case repeatedly and clearly charged the jury that the only basis upon which they could return a verdict for the plaintiff and against the defendants was upon a finding that the national contracting arrangement of the defendants was being used for the purpose of driving the smaller competitors out of the industry pursuant to an intentionally predatory conspiracy between them (1838, 1842-3, 1844, 1845-7).* The jury found for the plaintiff under this charge.

C. THE THEORY OF LIABILITY AND THE COURT'S INSTRUCTIONS WERE FOUNDED ON *UNITED MINE WORKERS v. PENNINGTON*, (1965), 381 U.S. 657.

The theory in this case of predatory conspiracy between a union and business groups to drive competitors out of

* Page references, unless otherwise stated, are to the Joint Appendix in the Court of Appeals which has been certified to the Supreme Court.

markets and out of business was founded on *United Mine Workers v. Pennington*, 381 U.S. 657, which, in turn, was based upon *Allen Bradley Company v. Local Union*, 325 U.S. 797. Congress has allowed the *Allen Bradley* decision to stand for 25 years as a much relied upon precedent. This case was tried before the decision of this Court in *Ramsey v. United Mine Workers*, No. 88, October Term 1970.

D. THE FOUR JURIES WHO HAVE CONSIDERED THE ALLEGED PREDATORY CONSPIRACY IN THE COAL INDUSTRY HAVE ALL FOUND THAT THE CONSPIRACY DOES EXIST.

In the four cases in which juries were asked to determine whether the alleged predatory conspiracy actually existed in the coal industry, *all* of the juries have responded in the affirmative. Besides the verdict in this case, there were affirmative verdicts in the "*First Pennington Case*", *Pennington v. United Mine Workers*, 325 F.2d 804, reversed and remanded 381 U.S. 657; *Tennessee Consolidated Coal Company v. United Mine Workers*, 416 F.2d 1192; cert. den., 397 U.S. 964; and in *Blue Diamond Coal Company v. United Mine Workers*, Civil Docket No. 6189, United States District Court for the Eastern District of Tennessee, Northern Division (no appeal).

E. THE TRIAL COURT DID NOT SUBMIT TO THE JURY ANY THEORY OF LIABILITY BASED UPON THE ILLEGALITY OF AN AGREEMENT WITHOUT SPECIFIC PREDATORY INTENT BY THE UNION WITH ONE BARGAINING UNIT TO IMPOSE CERTAIN WAGE TERMS IN OTHER BARGAINING UNITS, WHICH WAS PART OF THE THEORY IN *RAMSEY v. UNITED MINE WORKERS*, NO. 88, OCTOBER

TERM, 1970. THE JURY HERE HAD TO FIND PREDATORY CONSPIRACY BEHIND THE NATIONAL CONTRACTING ARRANGEMENT UNDER THE COURT'S CHARGE.

On December 7, 1970, this Court heard argument in *Ramsey v. United Mine Workers*, No. 88, October Term, 1970, (decided February 24, 1971) on certiorari to the Sixth Circuit, 416 F.2d 655, a case tried by the District Court without a jury. The theory in that case went beyond simply predatory conspiracy to drive competition out of the industry and also included the contention that there was proved an agreement by the union with one bargaining unit to impose certain wage terms in other bargaining units, and that this agreement was illegal, even without specifically proving predatory intent. This additional *Ramsey* theory was not charged to the jury in this case. Rather, the Trial Court confined his charge to the alleged intentionally predatory conspiracy relying on *Pennington* and *Allen Bradley*.

F. THE TRIAL COURT GAVE BOTH DEFENDANTS THE BENEFIT OF A GENEROUS INSTRUCTION UNDER THE "CLEAR PROOF" RULE UNDER SECTION 6 OF THE NORRIS-LaGUARDIA ACT. THE CHARGE WAS MUCH MORE GENEROUS TO BOTH DEFENDANTS THAN WOULD BE JUSTIFIED UNDER THE CONSTRUCTION PLACED ON SECTION 6 BY UMW IN ITS FINAL BRIEF AND ARGUMENT IN THIS COURT IN *RAMSEY* OR BY THE DECISION OF THIS COURT IN *RAMSEY*.

The courts have been confronted with the meaning and scope of the "clear proof" rule under Section 6 of the Norris-LaGuardia Act in this series of coal cases, including *"Second Pennington"*, *Lewis v. Pennington*, 400 F.2d

806, cert. den. 393 U.S. 983; *Tennessee Consolidated Coal Company v. United Mine Workers, supra*; and *Ramsey v. United Mine Workers, supra.* UMW in those cases had argued that "clear proof" must go to final conclusions on every phase of antitrust cases against labor unions such as this. In cases before *Ramsey* the UMW's argument was not aimed primarily at specific language in Section 6, but apparently was more related to the exemption provided unions under antitrust statutes when they act alone, and UMW was the only defendant in previous cases. The UMW urged that when a union was involved as a defendant in an antitrust case a new standard of proof should be fashioned for determining issues of liability. But this court rejected that contention in *Ramsey* saying: "Nor do we discern any basis for ourselves fashioning a new standard of proof applicable in antitrust actions against labor unions." The opinion of the Sixth Circuit in this case points up the soundness of this Court's conclusion in *Ramsey* even in face of any of the previous arguments which go beyond the language of Section 6 of Norris-La-Guardia.

In this case the Trial Court extended to both defendants the most generous charge that could reasonably be argued for under Section 6 or under either the majority or dissenting opinions in *Ramsey*. Section 6 pertains to responsibility for unlawful acts in labor disputes. The unlawful activity charged in this case was predatory conspiracy violating the Sherman Act.

The Court in this case charged " ... such an anti-competitive conspiracy as claimed by the plaintiff must be established by clear proof." (1836).

Then the Court finished off his charge leaving the version of clear proof that both defendants wanted strong and fresh in the minds of the jury:

"Members of the jury, the Court has already charged you that the issue of alleged conspiracy in this case must be decided upon clear proof, that is, the plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal, and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof." (1915).

The foregoing charge certainly extends beyond, and is more generous to both defendants than, what any instruction under Section 6 would be under the construction placed on that section by UMW in its final brief and argument in this Court in *Ramsey*, *supra*. In the latter case UMW had argued that all elements of the conspiracy must be proved by clear proof (as it had successfully argued in *Second Pennington*, *supra*) but after this Court granted certiorari in *Ramsey*, and realizing the error of its previous successful arguments along this line, UMW switched to the contention that Section 6 really was limited to proving authorization, ratification or participation in acts of agents, but that the Trial Court in *Ramsey* had actually so limited the rule.

The charge of the Trial Court in this case certainly goes considerably beyond the last UMW contentions in *Ramsey* and, we submit, satisfies any reasonable construction of the statute. The rule should not be resorted to simply as a snare or escape hatch to confuse courts and be construed in different ways to frustrate the attainment of a just result in such a case as this.

G. COUNTERSTATEMENT OF FACTS

1. The Petitions Have Challenged the Sufficiency of the Evidence and the General Fairness of the Jury Charge. Respondent Must Detail the Facts Sufficiently to Show These Challenges are not Valid.

Consol's petition, at pages 24 and 25, contends the District Court erroneously overruled Consol's post-trial motions based on insufficiency of the evidence and that the District Court's jury charge was generally inadequate and prejudicial.

Such questions as these cannot be adequately answered without giving enough detail in a statement of facts to show the Court the nature of the record upon which such questions are raised. Also the arguments under several of the other questions posed in the petitions are generally aimed at a kind of case that is not reflected in this record.

2. This Brief Contains Only an Abbreviated Outline of the Proof Previously Considered by the Court Including That Which Was Also in *Ramsey v. UMW*. This Brief Concentrates On New Facts in This Case About the Conspiracy and Its Effect on South-East.

This Court has recently considered *Ramsey v. United Mine Workers*, *supra*, which contained a substantial part of the evidence on developments in the coal industry which is also in this record. It would be unduly burdensome to detail that proof in a brief in opposition to petitions.

At the same time, in order to remind the Court of such proof, an abbreviated outline of the same is included in this brief below under heading number 4.

This Brief itself will concentrate on new facts in this record about the conspiracy and its effects on respondent and Eastern Kentucky. South-East was an older and more substantial coal producer than the plaintiffs in previous cases dealing with the alleged conspiracy. Also the president of South-East, Harry LaViers, Sr., had a personal acquaintanceship before the late 1950's with the principal officers of UMW, of Consol, and also with the other leaders in the industry. Before the 1950's, LaViers was one of UMW's good friends according to UMW (638-9, 1426). Also, before 1962 Consol was South-East's biggest customer (401-2). LaViers, before the 1960's, took an active part in various groups of industry leaders (479, 667). As far back as 1940 he was on the boards that administered NRA coal codes and the Guffey Act investigations (476). For these reasons the record in this case contains more evidence of the alleged predatory conspiracy in coal than previous cases.

3. Summary of the Basic Factual Contentions of the Petitioners. Since There Was Evidence From Their Own Records or Witnesses That Strongly Refuted Every Contention Made by Petitioners, It Cannot Be Said That the Jury's Verdict Was Unreasonable.

Petitioners contended that they did not combine, conspire or agree as charged. The prime effort of petitioners at the trial was to make subsidiary factual contentions to counteract the obvious fact that petitioners anticipated and knew, that their long sustained and willful course of conduct would wreck and was wrecking, the businesses not only of South-East but also all the other competitors similarly situated throughout the industry, and also to counteract the proof in this record from minutes of as-

sociations and committees that the UMW's national contracting course of conduct was insisted on by the associations of companies whose purpose was to raise coal prices by attacking competing production through the union (794-836, 881, 1654-64).

UMW contended (1) it adopted its uniform national contracting practice pursuant to policies adopted early in its history favoring uniform wages, and that it made no change in policies in 1950 on the formation of BCOA as claimed by respondent (a contention inconsistent with UMW's own official records as shown in heading number 4 below). UMW further contended (2) respondent never sought any contract from UMW except the "standard" or national contract and merely procrastinated in signing a renewal of that contract until the local unions struck, and (3) that UMW's district officers stood ready and willing to "negotiate item by item" with respondent.

The petitioner, Consol, contended (1) it was no more responsible for the establishment and activities of BCOA and the resulting national contracts than other signature companies; (2) that while it stopped purchasing respondent's coal when respondent cancelled the UMW contract, Consol was not boycotting respondent's coal; that Consol never did pay any attention to the language of the Protective Wage Clause (PWC) of the national contract that called for a boycott of respondent's coal when respondent cancelled and stopped complying with that contract. Also Consol contended (3) it stopped buying respondent's coal because it did not need it since the market for this type coal was on the decline.

Both petitioners contended (1) respondent was equally guilty as the petitioners (pari delicto) since it was a member of Southern Coal Producers Association (SCPA) which

agreed to the national contracts on behalf of its members. And both petitioners contended (2) respondent's troubles stemmed altogether from poor judgment and lack of good management.

There were other lesser contentions made by petitioners but most of their proof was devoted to the foregoing propositions.

With respect to UMW's contention that plaintiff never sought any contract except the UMW "standard" or national contract, this is the testimony of five UMW district and local representatives. But their testimony is directly contrary not only to the testimony of plaintiff, but to the written pleas of plaintiff to UMW's principal officers begging for a more practical and workable contract. Receipt of these written pleas was acknowledged and they are in the record, but it is conceded that there were no responses from UMW (440-1, 452-3, 624-6). "Negotiations" extended over a period of four years and two long, devastating strikes. The UMW international officers did not testify and a substantial part of the "bargaining" efforts of plaintiff was with them (443-5, 461-3, 901-5).

The district and local officers also testified that they stood ready, willing and able to "negotiate item by item" with plaintiff and they made a point of impressing this on the plaintiff and the plaintiff's employees. But they also acknowledge that plaintiff completely revealed its financial records to UMW representatives but these representatives say they never heard or saw anything that "they could recommend to the scale committee that they should accept" (1417). It is also true that UMW answered interrogatories in this case on May 22, 1967, disclosing that no one in UMW could approve contract terms except its international scale committee, on which sat its international

officers, and these authorities have not approved a single change in a single contract with a single producer at variance with the national contract as amended since 1950 (754, 777).

As to Consol's contention that it has no more responsibility for the establishment and later activities and contracts of BCOA than other signature companies, Consol's chief officer, Mr. George Love testified as a "live" witness at the jury trial in this case, "you certainly didn't want your competitors to pay less wages, if you could do anything about it, than you did" (1486), and one thing wrong with the coal industry was there were too many companies (1485). Love was one man in the industry who "could do anything about it."

He talked about forming BCOA in 1949 with Harry Moses (851), and it is stipulated by Consol that BCOA's articles of association empowered George Love to call the first meeting in 1950; that he called that meeting, became the first chairman and then headed the committee that obtained Harry Moses as president, the officers and directors of Consol and of Moses' company (Frick Coke Company of U. S. Steel) having over 50 percent of the voting power in BCOA by reason of representation of participating annual production (860-870). Love or his Consol successor served on the special three-man committees that assisted Moses in negotiating with UMW after that (1341, 1376, 1491-2).

There is one area of sharp conflict in testimony concerning the alleged boycott of plaintiff's coal by Consol. The latter had purchased very substantial quantities of plaintiff's coal for a number of years, but after September, 1959 and before 1962, Consol not only bought the coal but insisted upon being sales agent for all the plaintiff's coal

(401-4). When plaintiff had three years of operating losses it advised Consol in late 1961 that it was going to have to cancel the UMW contract. The plaintiff's testimony is that the Consol representative advised that if this happened Consol could not continue to handle plaintiff's coal (425-6, 431-2, 894). The Consol witness denies this (1567).

But there was the PWC in the national contract at that time—plainly calling for a boycott by Consol if plaintiff did not pay national contract terms (431, 1920). Plaintiff's officers believed the word that Consol would no longer handle the coal, and they believed the contract meant what it said. So they proceeded to start setting up a new sales company, advised Consol of this, gave the required sixty days notice of cancellation of the UMW contract, and cancelled the Consol agency when the new sales company organization was complete (432-5, 680-2).

Virtually no more of plaintiff's coal was purchased by Consol, for the first time in many years dating back to long before the Consol-plaintiff agency relationship had been established (401-3, 437-40).

Now, Consol says it was not applying a boycott even though the then existing national contract called for a boycott and even though it was a heavy stockholder and creditor of plaintiff, and plaintiff tried hard to sell coal to Consol (437-40, 683-6).

Consol says it never did inquire into the wages or union connections of its suppliers and that from the very beginning, when PWC was put in the contract in 1958, Consol never paid any attention to that clause and made no policy change as to dealing in the coal produced by others. Consol witnesses testified that when the PWC was put in the contract the instruction issued in the Consol organization was to make no policy change. Their explanation

was that the Landrum-Griffen "Hot Cargo" provision raised a question of illegality as to the clause (858-9, 1451, 1460, 1473, 1558).

But Landrum-Griffen came almost a year after the PWC was put in the contract and it came after the Joint Industry Contract Committee (JICC) (the policing body under PWC) had made formal findings of violation on the part of over 1300 coal companies for not certifying compliance with PWC, this information being contained in minutes of JICC which South-East was able to locate and put in evidence (794-835).

While Consol was the largest company and had such a part in setting up the machinery that made the contract, the jury obviously could not swallow the Consol contention of never having paid any attention to the language when that language was being strictly applied against over 1300 lesser companies (816-825). The Consol testimony on this point simply was not believed, with full justification, when Consol did refuse to buy any more South-East coal exactly as required by the PWC.

Another explanation Consol furnished for stopping the buying of plaintiff's coal was that the market for this type coal had declined and the small quantities required were readily available from other companies for whom Consol continued to act as agent. Two Consol purchasing officers previously associated with purchases from plaintiff, Messrs. Burke and Durkin, supported this theory (1444, 1470-1). But a later Consol witness, the man most closely associated with the situation, Mr. Thompson, had an entirely different, more detailed and far more believable story on cross-examination. He was a Consol witness and his version on being cross-examined was that Consol's Cleveland office let it be known that there would be no

plaintiff's coal and this came in late 1961 (a time when plaintiff had revealed its intent to go non-union but sometime before it cancelled the Consol agency). Thompson testified that this was a shock to the Consol purchasing organization which needed very substantial quantities of that type coal. After a considerable period of efforts by this witness, with conferences between various Consol offices, and testing of coal and adjustments made at the preparation plant of another company, a replacement was finally made for plaintiff's coal (1642, 1646, 1648-50). So the final Consol excuse that Consol had no need for plaintiff's coal missed its mark with the jury for obvious reasons.

As to the defense of pari delicto, there is little left of this defense in an antitrust suit after the decision of this Court in *Perma-Life Mufflers, Inc. v. International Parts, Inc.*, 392 U.S. 134. Also to show there is no factual basis for that defense we refer to the part of this brief below under heading number 5.

As to the defense that plaintiff was guilty of poor judgment and lack of good management, the "poor judgment" charge stemmed from the agonized decision of plaintiff's officers and stockholders not to abandon operations in Eastern Kentucky as Consol had done when the best mining conditions were exhausted (1537-8); not to liquidate and retire to easy living on the company's fat accumulated surplus when old properties approached exhaustion; but rather to find the best coal property remaining in Eastern Kentucky and stick in the coal business there. Defendants' own counsel on cross-examination, brought out that one aspect of this decision was to help alleviate the extreme economic difficulties and severe unemployment rampant in Eastern Kentucky coal fields (380, 531, 886-7, and see Plaintiff's Exh. 8, 1942).

As to the defense of poor management, defendants' witness, one of the best qualified to know, testified that plaintiff was the most highly efficient and productive producer left in Eastern Kentucky (1403). Plaintiff had done everything possible to get production costs to the bare minimum in its condition (354, 891-2).

The issue of predatory or anticompetitive conspiracy was presented to the jury in the clearest and most understandable words possible by the Trial Court in its charge. The jury found against defendants. Looking at the record as a whole (without "compartmentalizing the various factual components and wiping the slate clean after scrutiny of each" — *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 699), it is difficult to see how any jury could come up with a different answer.

4. Brief Summary of the Proof of Agreements and Understandings in the Coal Industry that Was in *Ramsey v. UMW* as Well as in This Record.

To be brief we shall only outline the areas of the proof previously considered by this Court in *Ramsey*.

Contrary to the contentions of petitioners, UMW did not have a consistent wage uniformity policy before the organization of BCOA in 1950. Differentials gave recognition to all segments of the industry in collective bargaining. Uniformity in wages made no substantial gains until the heavy demands for coal of the World War II period. The decline in the coal demand in the post-war period left the alternatives open to UMW (1) to retain a system of substantial differentials in wages, (2) to push through a plan of production control to assure employment for a maximum number of members, as it actually set out to do in 1948 and 1949 in the Bituminous industry and actually did in the

Anthracite industry, or (3) surrendering to the demands of Consol and the major companies to allow no difference in wages throughout the industry with the obvious and necessary effect of wiping out competition and jobs for members (630-1, 852, 1007-11, 1022-6, 1111-3, 1165-76, 1360-1, 1389-92, 1486).

This record shows clearly that the third alternative above was deliberately chosen. It shows why the wage differentials system in coal before the 1940's was fair and promoted maximum jobs and competition and also why the system devised by UMW and BCOA of flat wage increases across the board for every job in the industry after 1950 was unfair and drastically restrained employment and competition. It is established in the record that once a business unit or group seizes control of industry-wide wage policy in an industry like coal, it can regulate all the economics of the industry (357-360, 364-5, 885, 889-890).

In the bargaining conferences before 1950 in which UMW had negotiated terms with the northern conference, the Southern Coal Producers Association and the "captive" mines, there were open meetings with board representation and every segment of the industry found a voice.

The Bituminous Coal Operators Association was formed on July 22, 1950, resulting from discussions between Mr. Harry Moses (of U. S. Steel) and Mr. Love (of Consol) that had commenced in 1949 (761, 850-1).

It was Mr. Love of Consol, who wanted competitors to pay wages no lower than his if he "could do anything about it" (852, 1022-3, 1486). Representing the largest company and being the spokesman for the northern industry in labor matters, he was in a position to do something about it and he proceeded to do it.

Love and his collegues decided they would try to get the negotiations out of the public view and into private sessions. This was a decision of the industry leaders, not the union (1333, 1345-7, 1479-81). According to Mr. Love, this accomplished the big change that did occur in 1950, since after BCOA was established the contracts could be negotiated "quietly" in Washington where the negotiators had their officers (1481).

In fact, to show UMW was not connected with this change UMW's chief counsel, whose testimony was read, stated that there was discussion in the press from industry leaders "that a tsar (sic) in the industry was going to be in the bituminous industry, was going to be selected by the operators and there was all sorts of speculation in reference to it in June of '49 and the union publicly disclaimed connection with this movement" (1270). However, it is true that Lewis had said shortly before: "If the operators of this country can't give any leadership on the commercial side of this industry, the United Mine Workers of America can and will" (1360-1). And it is true that when BCOA was established UMW did readily enter into "quiet" and private negotiations with BCOA for contracts that did, in fact, cover the entire industry. Also it is true that the chief officers of both BCOA and UMW have welcomed and praised the opportunity to sit down in private session to decide the problems of the whole industry "authoritatively" (776, 1347).

Under BCOA a new bargaining technique was developed. Throughout the 1950's two-man bargaining teams in "quiet" or "mystery" bargaining worked out a series of very substantial, flat, across-the-board wage increases in amendments to the National Bituminous Coal Wage Agreement of 1950, applicable in identical amount for every job in the industry. Consol officers were always on the three-man

committee that prompted the BCOA representative in making these amendments to the National Contract. UMW has not allowed a single change in a single contract with a single coal producer from the printed forms that were worked out in these sessions (763-771, 775, 777, 1275-7, 1481).

Even the third largest coal association (Illinois Coal Operators Association) containing the second largest coal company of the country could not escape from the dictatorship of the BCOA Contracts (1659).

The record shows the dramatic shift in the policy and attitude of UMW after the formation of BCOA. Instead of pursuing its historic policies favoring equal work opportunities for all members and competitive equality, after 1950 UMW considered the smaller units as "just a drag on the industry" and "more of the obsolete units will fall by the board and go out of production" (784-5). UMW acknowledged the contracts were forcing intensive mechanization (788) and UMW favored the taking over of the industry by the combines being formed in the industry (1106).

Under this authoritative UMW-BCOA dictatorship which concededly was forcing intensive mechanization on the industry, the average number of men employed in the industry daily has fallen rapidly. In 1950 there were approximately 416,000 men employed and in 1959 there were approximately 180,000 men. By 1966 the figure was 131,752. This is attributed to mechanization and increased productivity required by the flat wage increases across the board. In 1920 the underground production averaged 3.97 tons per man per day. In 1949 it was still only 5.42 tons. But by 1963 it was 12.78 tons. This does not include surface mining which shows much higher figures. Plaintiff

engaged only in underground production (351-2, 355) (Plaintiff's Exhs. 6 and 7, 1940-1).

Much has been written of the tragedy and despair in the regions (mostly in the Appalachians) tied to the coal industry where the attainment of the highest degree of mechanization was more difficult or impossible.

At the very time when these harsh economic consequences of their actions were taking place, the petitioners were busily engaged in tightening up the screws of their dictatorship so as to remove from these people any ray of hope at all for work or self-support. This brings us to the period of 1958-1959 when BCOA formed a consortium with the next two largest coal associations (the Illinois Coal Operators Association and the Southern Coal Producers Association (SCPA)) and inserted the Protective Wage Clause (PWC) into the December, 1958, amendment to the national contract. The terms of the PWC are in the record at pages 1919-1921.

5. This Record Goes Beyond the *Ramsey* Record. It Establishes That Consol Controlled BCOA, That the Purposes of the Contracting Policy of UMW, BCOA and Other Major Associations Was to Drive Out Competition to Raise Prices, That the Effects Have Been Extreme in Eastern Kentucky, and Harry LaViers of South-East Tried Long and Hard to Change the National Contracting Pattern to Alleviate Distress in the Southern Fields. The Major Companies Would Not Listen.

The Articles of Association of BCOA gave Mr. Love the power to call the first meeting of BCOA. He called that meeting in 1950 and became its first chairman. Under BCOA voting rules the officers and directors of

Consol and of Mr. Moses' company (H. C. Frick Coke Company, division of U. S. Steel) could control any vote (860-6). Love and his Consol successors served on the three-man committee of BCOA that controlled the bargaining (1341, 1376, 1491-2).

As stated above, the effects of BCOA's contracts have been severe in drastic unemployment and economic deterioration in many areas. Of particular concern in this case are the statistics and findings of the United States Department of Labor in 1959 as to the five-county area of Eastern Kentucky wherein this plaintiff, South-East, operated. This has been the hardest hit area in the country and blight and suffering has been indescribable and apparently unescapable (356-360).

The efforts of UMW members in these areas, driven out of jobs as have about two-thirds of the union membership, to find and hold onto work in non-contract coal operations brought on the PWC in 1958 and 1959. The part that the major associations had in getting PWC into the national contract is important in this case.

Of particular interest in SCPA since its territory encompassed Eastern Kentucky and plaintiff was a member of SCPA before 1962. The defendants in this case went to great lengths to tie South-East to responsibility for SCPA actions and to show that Mr. Moody, head of SCPA, was the principal instigator and prime mover (along with Mr. Fox of BCOA) in getting the PWC into the national contract (790-1, 794, 1278-9, 1654-6).

The reasons and purposes for the PWC being put in the contract, according to the report of Mr. Moody to his SCPA Board of Directors in the regular minutes of that Board for the meeting of December 3, 1958, were as follows:

"In the promulgation of this contract over the years, and especially in the past ten years, we have established a wage situation whereby most operators and industry as a whole had to go to general mechanization of their operations because of the very high cost of labor. In so doing, in the case of the coal industry, there was a major decrease in the number of employees and according to the Bureau of Labor Statistics there was a drop from 400,000 to less than 200,000.

"There has been a major increase in the number of pensioners. Many miners left the coal fields, but many have returned and many never left and so we find a surplus of labor throughout the coal fields. The law of supply and demand took over and we discovered that the labor price established by the contract was not the price established by the number of miners available for work. This situation encouraged the establishment of mines, not under the union contract. This also presented the union with a problem, as they found men who were members of the United Mine Workers effectively opposing interference with their non-contract operations in order to hold their jobs. Therefore, the union found it was unable to carry out major organizing campaigns. Lastly, the coal market was rather seriously weakened as far as price was concerned, as there was a premium of non-contract, low-priced coal." (1661-4, 1944-5)

Defendants claim plaintiff is equally guilty with them of any antitrust wrongdoing because of its membership in SCPA and the service of Harry LaViers, Sr., on the SCPA Board of Directors. Mr. LaViers, Sr., was president of plaintiff and was a charter member of SCPA in 1941.

SCPA was the second largest association of coal producers. BCOA, and the predecessor group of operators

that made up the Northern Conference that had formerly met with UMW, made up roughly one-half of coal tonnage (761—one line missing, see transcript 1009; 1225). SCPA made up about one-fourth of the tonnage (671, 1009).

SCPA was organized October 17, 1941, after the dispute that year over the elimination of the north-south Appalachian differential (1260). The northern group got the union to put a "most favored nation" clause into its new contract that year, which meant that UMW would be bound to eliminate in the southern contracts the general 40 cents per day wage differential that southern appalachian companies previously had below northern appalachian companies (476-8, 627-31, 1219-1220).

The purpose of SCPA was to join together to combat the application in the southern Appalachian companies of the contracts negotiated by UMW with the northern group (660). But it developed after BCOA that SCPA could get no meaningful audience with UMW, and the UMW-BCOA national contracts were made to apply in the south as elsewhere. SCPA had no effective part in their negotiation. The south had the alternatives of signing or taking a sixty-day notice of contract termination and strike (481, 486-7, 579-80, 657-9).

Mr. LaViers was a charter member of SCPA and explained SCPA on cross-examination as follows:

> "The Southern Coal Producers Association was organized in 1941, when the northern and the United Mine Workers imposed or tried to eliminate—did eliminate the 40-cents differential.
>
> "Since then, it has participated in some national wage negotiations, and after 1950, when the national coal wage agreement was agreed upon by the BCOA

and the United Mine Workers, the Southern Coal Producers Association has had practically nothing to do with any negotiation subsequent to that time.

"It has attempted to have improvements made in the contract, it has tried to add differentials established that would recognize the economic conditions in the various producing areas.

"It has tried to effect other changes in the contract, to clarify it, and to make it what we thought was a more equitable and reasonable contract, and we have had practically no success whatsoever along that line." (579)

As a charter member of SCPA, Mr. LaViers agreed with the purposes of SCPA (660). Being in SCPA he had no part in contract negotiations (343-4). He was not a labor-baiter, nor did he believe in resisting honest union efforts to relieve the distress of the miners who, at one time, were as much in need of a strong union as any group in the country. In fact, defendants made a point in this trial to show that Mr. LaViers was known at one time as one of UMW's best friends and took the position that a contract with the union was a stabilizing influence on the industry (490, 639).

But, the situation that developed under UMW-BCOA in the 1950's was an entirely different thing (490). Mr. LaViers did not think the contract should be rigidly applied to everyone and every type job alike without the right to negotiate changes (557-8). He fought harder than anyone else in the industry in the 1950's, consistent with the original purposes of SCPA, to have a contract with fair and equitable differentials. And he saw clearly then what was eventually to be done to the industry by an iron-bound

uniform national contract (as seen above)—the forcing of large parts of the industry to quit or to go non-union. This was what he preached for years as head of the Labor Committee of the Coal Executives Conference, an organization of leaders of the industry from all sections (666-7).

Mr. LaViers prepared and presented to the Coal Executives Conference in Chicago on May 20, 1954, a resolution which read:

> "A. The present high cost of production of bituminous coal brought about by the existing Labor Agreement has resulted in a loss of more than one-third of the market for commercial coal and has created a competitive condition both within the industry and with competing fuels that is disastrous. The present agreement imposes burdens to which other industries are not subjected.
>
> "B. A fair and equitable labor agreement could contribute an element of stability to the industry and therefore is desirable.
>
> "C. Because certain terms and conditions in the present agreement are burdensome and have provided such a profitable incentive to avoid the said terms and conditions there is a rapidly growing movement toward non-union and semi-union operations with which union commercial mines cannot compete and because if present inequalities and incentives are not adjusted they will inevitably bring further chaos to the industry. Therefore, we recommend that representatives of this organization immediately seek a conference with representatives of our employees in order to eliminate or modify these improper terms and conditions.

"D. We believe that any proposal affecting the labor agreement should be an integral part of an overall 'Plan of Survival' for the industry and should be considered and presented along with proposals on market stabilization, legislation, transportion, etc." (667-8)

Mr. LaViers was unsuccessful in getting this resolution adopted, and he proposed it so many times that "it became a matter of some jest" in the Coal Executives Conference (668).

Mr. LaViers later talked to many union representatives and others in the industry about his concern that there be changes—that the contract be fair and equitable and not so rigid, because it was forcing many companies to abandon any contract, simply not comply or go non-union, resorting to extremely low pay scales with which no union company could compete. He was, in all instances, seeking a change from the rigid contracting pattern because of its effects (557-8, 648-9).

In the late 1950's there came a change in the majority views in SCPA as to purposes and policies. Consol became influential in SCPA in 1957 or 1958 when it purchased Pocahontas Fuel Co. (653). Mr. Matthews was representing Consol in both SCPA and BCOA at the very time when he was on the BCOA special committee directing Fox when the PWC was negotiated (653, 661-2, 876, 1492). By 1960 several of the other stronger companies in SCPA were also members of BCOA (661-2).

We have shown above that Mr. Moody, head of SCPA, was talking with UMW and Illinois Association representatives about a proposed PWC sometime before the PWC of 1958 was proposed to the SCPA meeting of December 3, 1958 (1655). We quoted above what Mr. Moody told the

board members, including Mr. LaViers, about the PWC. There was no revelation to LaViers in this discussion about Mr. Moody's prior contacts as co-initiator and co-drafter of the clause. It was presented to the board as a "fait accompli" about which the SCPA board could do nothing (659, and see Plaintiff's Exh. 10, 1946). Mr. LaViers voted for signing the clause and later went along with sitting Mr. Moody on the Joint Industry Contract Committee, but there was no alternative (659). At that time plaintiff was not purchasing coal and would not have to do any boycotting (383).

But, as shown by his course of conduct, Mr. LaViers did not willingly approve of PWC. It was directly opposite to what he and SCPA had previously made basic policy with respect to the contract. An inflexible contract could not be stabilizing (640, 648-9). He vigorously questioned with SCPA legal counsel the legality of the clause—from the time he first saw it on December 3, 1958, to subsequent trips to Washington when he went to the counsel's office (490-1, 558, 634).

Even after PWC was in full sway and while the JICC of Lewis, Owens, Kennedy, Fox, Moses and Beebe were busily making findings with respect to compliance with the uniform national contract terms on the part of over 1300 companies (as will be hereinafter related), Mr. LaViers was still urging the SCPA to consider and study what could be done about the dismal economic plight of the Eastern Kentucky coal fields, as shown in SCPA minutes (659-60).

Mr. LaViers was finally able to get SCPA to set up an economic committee to study the sorry situation throughout the southern district (664-5). The minutes show that on a sub-committee under this, Mr. LaViers went to see

the international union officers to try to get modifications of the contract to relieve the critical economic situation in the southern fields (567-8, 665). This trip was unsuccessful and the SCPA minutes of November 14, 1960, show the failures of this committee to get anything done, but able only to report recommendations for future efforts, including (1) possible legislative recommendations for stabilizing the industry and (2) possible wage agreement modifications (568-70, 665-6). There was no agreement among the SCPA board members on these things (666).

This committee was able to get nothing done. Mr. LaViers told the board August 4, 1961, he did not think there could be any agreement reached and recommended the committee be dissolved. Shortly thereafter Mr. LaViers and plaintiff resigned from SCPA (666). Sometime later, in 1968, SCPA became a part of BCOA (1264-8).

We have related above how PWC came into the national contract in 1958. Rebellion in its membership ranks was affecting UMW organizing drives and coal prices were being affected by competition of coal mined by the miners displaced by the machinery forced on the organized industry. The effort was to drive this coal out of markets. The PWC is set forth in the appendix (1919-21).

There is no dispute in this case that Lewis and Kennedy of UMW, Fox of BCOA, Moody of SCPA and Beebe of the Illinois Association were working together in drafting the PWC to be inserted in the national contract. These men, plus Mr. Owens, Secretary-Treasurer of UMW later became the members of the joint committee (JICC) that policed the industry in the observance of this clause.

Paragraph D of PWC required UMW districts to report "complete" lists to the JICC of the names of "all" of the operators "whose operations are under contract with the union."

The minutes (794-835) of the JICC, whose members were the men who formulated the language of the clause, show that the districts of UMW were required to send in lists to the JICC certifying that each list was a "complete list of all operators and mines engaged in the production of bituminous coal within District ..., and whose operations are under contract to the said union" (801). These lists were added to from time to time, as new contracts were made.

The JICC sent out demands to all of the companies, without question or regard to what kind of contract they had with UMW, that they send back certification of compliance in the prescribed form (800-1)—that is, that they were paying the national contract scale and welfare royalty and had "complied fully with the other provisions of the said national agreement."

Hundreds of companies did not send back the certifications, and, after a second letter of warning, formal determinations were made and recorded of violation of the Protective Wage Clause on the part of 1328 coal operators across the country, the determination being that every such producer "has violated the Protective Wage Clause" of the 1950 contract as amended, and:

> " ... has failed and refused to comply with it obligation under such clause to certify in writing to the Committee that it is in full compliance with all of the terms and conditions of such agreement." (816-822)

The Landrum-Griffen Act with its "hot cargo" or secondary-boycott provision was passed by Congress in September, 1959. The JICC had been at work several months and was getting its enforcement program into high gear. But the new act cast doubt upon the legality of the boycott contained in Paragraph B of PWC. Because of

this JICC passed a resolution on November 4, 1959, suspending enforcement of the boycott pending clarification of the legal situation (823-5).

Ultimately JICC authorized attorneys to represent the members in any proceedings challenging PWC (Tr. 1350-1), and a NLRB case was filed. The case is still going on. It is founded on Landrum-Griffen and has nothing to do with antitrust law (1232-4, 1530).

But it was expressly understood that there was no suspension of UMW's obligations under Paragraph A of PWC (664, 827-8, 1533). The JICC met occasionally until 1964. There is no instance revealed in the minutes of any violation of PWC by UMW (822-35).

However, it is evident the interruption in the work of the committee by Landrum-Griffen was having its effect in renewal of competition and rebelling of UMW members. On March 12, 1964, Fox of BCOA wrote the president of Island Creek Coal Company, largest southern company in SCPA:

> "Dear Jim: Thank you very kindly for your letter of March 10, 1964. The matter of the competition of those in the bituminous industry who are non-signators to the National Bituminous Coal Wage Agreement and thereby not obligated to pay a higher wage scale and the 40-cent royalty has been discussed on many occasions with the United Mine Workers.
>
> "I hope that my presentations and the presentations of others in the industry to the officials of the United Mine Workers of America will make them appreciate the seriousness of this situation, not only to the coal companies, but to the United Mine Workers of America as well.

"It is most difficult to meet any demands made by the Mine Workers when there is a lack of opportunity to increase the price of coal to meet these demands." (881)

Another provision against non-union or non-complying coal was inserted shortly after the above letter, by UMW-BCOA in the 1964 Amendment to the National contract. This was the "80¢ Welfare Clause" (1375, 1378). This provision reads:

"During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forty cents (40¢) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition." (410, 836)

Again there was a challenge of the inherent boycott of this clause under Landrum-Griffen. An NLRB case that is not concerned with antitrust law still goes on over the 80¢ Clause, UMW and BCOA contending for the legality of the clause (1232-3, 1527-30).

The 80¢ Clause was kept in the 1966 contract by UMW-BCOA, in spite of the NLRB case (1532-4). (In fact it was

kept in the 1968 contract, but that is de hors this record—see transcript page 2578).

We have commented above on the drastic unemployment and economic decline in many coal-producing areas. It remains to mention the effect of a decade of these national contracts on the industry as a whole.

By the year 1959, the operating loss of the entire corporate coal industry was $7,300,000 for that one year (420, 1515-6, 1966-7).

In contrast, Consol had net *profits after taxes* as follows:

1959	$20,523,000	
1960	19,064,000	
1961	22,824,000	
1962	24,358,000	
1963	28,569,000	
1964	33,278,000	
1965	41,167,000	(742)

Then in 1966 Consol became the first of the coal combines to be absorbed into an oil company to form the first of the so-called "energy companies."

ARGUMENT

A. THIS COURT HAS LAID TO REST ALL OF THE PRINCIPAL ARGUMENTS OF THE PETITIONERS IN ITS DECISIONS IN *ALLEN BRADLEY CO. v. LOCAL UNION*, 325 U.S. 797, *UNITED MINE WORKERS v. PENNINGTON*, 381 U.S. 657, AND *RAMSEY v. UNITED MINE WORKERS*, NO. 88, OCTOBER TERM, 1970.

All of the arguments and questions raised by petitioners other than the ones dealing with matters of procedure have been answered decisively and contrary to the contentions of petitioners in the majority opinions of this Court in *Allen Bradley Co. v. Local Union*, 325 U.S. 797, *United Mine Workers v. Pennington*, 381 U.S. 657, and *Ramsey v. United Mine Workers*, No. 88, October Term, 1970.

B. QUESTION NO. 1 RAISED BY UMW IS WRONG IN ASSERTING THAT THE JURY WAS ALLOWED TO FIND LIABILITY ON THE BASIS OF AN AGREEMENT BY THE UNION WITH ONE GROUP OF EMPLOYERS TO IMPOSE WAGE TERMS ON COMPETING COMPANIES WITHOUT A SPECIFIC FINDING THAT THE ARRANGEMENT WAS DELIBERATELY MADE AFTER A MEETING OF MINDS TO DRIVE THE COMPETITORS OUT OF BUSINESS.

UMW's question number one (and also its statement of the case at page 9) asserts that the jury was allowed to consider two theories of liability. The contention of UMW is that the jury was permitted to find the defendants liable (1) on a UMW-BCOA agreement to impose wage terms on other units, and (2) on predatory conspiracy.

The only language in the jury charge that UMW refers to in order to establish that the jury was allowed to find

liability on the first theory (no predatory conspiracy) is that part of the charge wherein the Court instructed the jury on the rights and exemptions of labor unions under the labor law. The Court charged these labor law rights fully. But the Court concluded this part of the charge with the limitations under labor law on the union's rights and exemptions. Thus, under labor law (as recited in *Pennington*) the union has a duty to bargain unit by unit and is not free to bargain with one unit about labor terms for other units; the union should retain the ability to respond in each unit without being strait-jacketed by some prior agreement with favored employers and if it does so, it loses its exemption. It is this language that UMW relies on in its first question.

But UMW does not point to any language in the charge that goes on to say that this conduct or this kind of strait-jacket agreement (without intentional, predatory, anticompetive conspiracy with business groups) makes the union and favored employers liable to a damaged competitor under antitrust law or in this case. There is no such language. The Trial Court refused plaintiff's request for such a charge.

The case at bar differs from prior cases concerning the conspiracy in that there was introduced here direct evidence in the form of minutes of association meetings, correspondence, and minutes of the Joint Industry Contract Committee showing clearly that the NBCWA was being used to knock out the coal being put into the markets by non-contract producers in order to bring about an upward spiral in wages and prices, with pressure from the coal associations that the union thus cooperate with the purposes of the major companies who dominated the associations. For instance see 836 in connection with 881 of the joint appendix; also 1655 in connection with 1661-3;

794-835. There was ample evidence in the case to establish an intentionally predatory anticompetitive conspiracy behind the course of conduct of the union and major associations with respect to the use of the NBCWA and its amendments to destroy competition.

The reason that the Trial Court refused the plaintiff's request for an instruction under which the jury could have found liability on an agreement by UMW with one set of employers to impose wage terms on other employers without predatory intent was because of the timing of this trial in the history of the development of these cases concerning combinations of union and business groups.

In *Allen Bradley* this Court held (325 U.S. 809-810):

"But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.

" ... For if business groups by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves ....

"Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, depending upon whether the union acts alone or in combination with business groups."

In *Pennington* this Court held:

"One group of employers may not conspire to eliminate competitors from the industry and the union is

liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry." (381 U.S. 665-6)

This Court went on to consider in the *Pennington* case the legal effect of a particular type of agreement which it was contended had been made between the union and business groups, and this Court said at 381 U.S. 668:

"From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy."

After the remand, in *Second Pennington* the plaintiffs there attempted to show both an intentionally predatory conspiracy to eliminate competition back behind the use of the national contract and also that the specific type of agreement had been made by the union which put it in a strait-jacket with respect to bargaining with those plaintiffs and that this would violate antitrust policy without regard to the purpose or effect of that type of agreement, when it actually had destroyed the business of the plaintiffs. On the appeal of that case, the Sixth Circuit said that the plaintiffs' theory in this type of case must be confined to a predatory conspiracy to drive competitors out of business. 400 F.2d at 814-5. The Supreme Court denied certiorari in *Second Pennington*, 393 U.S. 983.

It was at this point that the case at bar was tried and the Trial Court was confronted with the restriction upon theories contained in *Second Pennington*. For this reason the single theory presented here was the intentionally predatory conspiracy behind the use of the NBCWA.

It was after the trial in this case that this Court cleared up the law on the question left after the Sixth Circuit's opinion in *Second Pennington* with respect to the legal effect of the strait-jacket type of agreement if an intentionally predatory conspiracy back behind such an agreement was not proved.

But in this case the Trial Court carefully confined the issue on liability to the intentionally predatory conspiracy. There simply is no room to have confusion upon this when the charge on liability was to the following effect:

> "In order to establish a conspiracy or unlawful arrangement as claimed by the plaintiff in this case it is not necessary that the plaintiff should offer proof of a direct arrangement or executed written contract that they are entering into a conspiracy.
>
> "It is not necessary that the agreement, if any, was the result of formal action on the part of the defendants. The real question to be determined is whether or not there was a meeting of the minds or a common understanding and purpose in the requirement of the execution of the labor agreement with the intention of doing injury to the plaintiff." (1838)
>
> "The South-East Coal Company claims that it has been injured and thereby damaged by the unlawful joint acts of the defendants, United Mine Workers of America and the Consolidation Coal Company. This alleged wrongful action is that the two defendants had been guilty of a conspiracy against the plaintiff.

"A conspiracy is an arrangement or an agreement or plan between two or more individuals or, as in this case, corporate entities, to commit an unlawful act, or to commit a lawful act, in an unlawful way.

"In other words, the plaintiff claims that this coal company, through its officers and agents, had a plan or an agreement, the officers and agents of the labor union, to require all coal producers in Eastern Kentucky coal fields to execute a contract with the United Mine Workers ...." (1843-4)

"You are instructed that if you believe there was an industry-wide collective bargaining agreement, whereby employers and the union agreed on the wage scale that exceeds the financial ability of some small operators, including the plaintiff, to pay, and that the agreement was made for the purpose of forcing some employers, including the plaintiff, out of business, or injuring its business, and you believe that the defendants, the Consolidation Coal Company and the United Mine Workers, deliberately entered into and participated in such an arrangement, and that the result of such an arrangement was the sole cause of damage, if any, to the plaintiff, then you will find for the plaintiff.

"If you do not so believe, you will find for the defendants." (1844)

"In other words, it is claimed by the plaintiff the defendants fixed the wages and Welfare Fund royalties so high in 1950 by the National Bituminous Coal Wage Agreement and the amendments thereto that the small companies, including this plaintiff, could not pay them and continue to operate successfully. And that the defendants knew that the small companies, including the plaintiff, could not pay the fixed wages and Welfare

Fund royalties, and that thereby the trade and competition offered by the small companies, including the plaintiff, to the larger coal producing companies, including the defendant Consolidation Coal Company, would be eliminated by putting the small companies, including the plaintiff, out of business.

"It is for you to determine from all the evidence and all reasonable inferences which may be drawn from the evidence whether or not these defendants had such an agreement or meeting of the minds for the intent and purpose of unreasonably restraining trade and monopolizing the coal industry in the eastern Kentucky locality by driving the small companies, including the plaintiff, out of business.

"You are instructed that the execution of the written contract is not of itself or per se a violation of the law.

"In order for the contract to be unlawful you must believe that its execution by the defendants was for the purpose and with the intention, among other things, of destroying or injuring the business of the plaintiff." (1845-6)

It is to this kind of conspiracy that the language of the Court of Appeals (referred to at pages 10-11 of UMW's petition) is directed. This kind of conspiracy was held to violate the Sherman Act in both *Allen Bradley* and *Pennington*. It is a violation whether or not it is called "per se" or "because of predatory intent" or whatever.

C. UMW'S SECOND QUESTION AND CONSOL'S SECOND QUESTION ARE WRONG IN CONTENDING THAT THE JURY WAS CHARGED IT COULD FIND LIABILITY WITHOUT FINDING AN INTENTIONALLY PREDATORY CONSPIRACY.

We submit that such parts of the charge as we have quoted just above demonstrate the incorrectness of the contentions made in the second questions of each of the petitions. The jury was clearly told that if there was no intentionally predatory conspiracy behind the use of the national contracts the finding must be for the defendants.

The point made by UMW's second question seems to be boiled down to the last paragraph at page 25:

> "Without some analysis from the judge of how the contract's provisions could have operated within the bargaining unit to injure competition, or some requirement that they find an additional agreement to impose its terms outside the bargaining unit, the jury was left at large to impose liability on the basis of a dislike of the union's motives, a result which the labor exemption was expressly designed to prevent."

We submit that this contention has no practical application in fact to the issue presented and found by the jury as illustrated by the quotations above from the charge.

Consol, at page 13-18 of its petition and dealing with its second question, picks language out of context from the charge of the District Court and opinion of the Court of Appeals to make it appear that the jury was permitted to decide the basic question of liability solely upon the parallel course of conduct of signatories to the NCBWA, and Consol contends that the jury was allowed "to conclude that 'having in mind' or having 'conscious knowledge' that

a legal agreement could harm a competitor was the equivalent of actual agreement" (Consol petition, page 13).

Even if Consol's analysis of the charge were correct, Consol would be faced with the holding in *Interstate Circuit v. United States*, 306 U.S. 208, 227:

> "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schenck v. United States*, 253 F. 212, 213, affd, 249 U.S. 47, [63 L. Ed. 470, 39 S. Ct. 247]; *Levey v. United States*, 92 F.2d 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

But the very language used here by Consol, when put back into context, means the jury had to determine the purposes of the petitioners, their actual intent, with respect to whether the NBCWA would "deliberately" and with "agreement or meeting of minds" be *used* to drive competitors out of the markets so the defendants would profit.

As stated, Consol merely takes isolated words out of context and does not discuss at all the main part of the charge with respect to the principal issue submitted to the jury. Petitioners make no reference to such parts of the charge as we have quoted above.

The isolated language chosen and relied upon by petitioners from the charge to the jury and the opinion of the Court of Appeals should be put back in context and taken in conjunction with the foregoing main part of the charge

with respect to the issue of liability. The issue sought to be raised under this question by petitioners is unreal and not related to the full import and meaning of the charge.

D. UMW'S FIRST QUESTION AND CONSOL'S FIRST QUESTION ARE WRONG IN CONTENDING THAT AN INTENTIONALLY PREDATORY CONSPIRACY BETWEEN A UNION AND BUSINESS GROUPS TO DESTROY COMPETITION MAY MERELY FORFEIT ANTITRUST EXEMPTION WITHOUT ESTABLISHING LIABILITY TO AN INJURED COMPETITOR.

As shown above, the issue on liability presented to the jury was whether the defendants entered into an intentionally predatory conspiracy to destroy competition in the bituminous coal industry. Under the District Court charge, no other agreement, understanding or contract of any type would be sufficient to impose liability on the petitioners. In a decision which has stood for over 25 years without change by the Congress, this Court held in *Allen Bradley* that such a predatory conspiracy, even though it involved a labor union, violated the Sherman Act and the defendants were liable therefor. The same rule was recognized in *Pennington*.

The District Court here refused to charge the jury that the defendants could be held liable for some other or different type of conspiracy or agreement, such as an agreement to impose certain wage terms on other bargaining units without specifically proving behind it a conspiracy and purpose to destroy the competitors in those units. All of the contentions and arguments raised by the petitioners concerning the latter type of agreement have absolutely nothing whatsoever to do with the actual jury finding in the case now at hand.

This kind of conspiracy violates the Sherman Act under the applicable decisions, and there remain no arguments, with respect to this type of conspiracy, that it can simply be held to result in a forfeiture of union exemption and not be a violation of the act for which the defendants are liable to a damaged competitor.

The petitioners have advanced no argument that would indicate that the obviously just and necessary rule in *Allen Bradley* should be changed after all these years when Congress has not chosen to change it.

E. THE RELIANCE BY CONSOL UNDER ITS THIRD QUESTION UPON THE *NOERR* AND *PENNINGTON* DOCTRINE PROTECTING THE RIGHT TO PETITION IS CLEARLY MISPLACED.

Under its third question, Consol relies on *Eastern Railroad Conference v. Noerr Motors*, 365 U.S. 127 and *United Mine Workers v. Pennington*, 381 U.S. 657. Consol says that the jury was charged that the labor contracts considered by themselves were lawful and then says on page 19 of its petition:

> "It is submitted that those cases (*Noerr* and *Pennington*) stand for the proposition that if an action is legal, then an anticompetitive intent or purpose will not make it illegal."

But clearly the doctrine of those cases was founded upon the constitutional right of citizens to petition their government representatives. There is nothing at all in a predatory conspiracy to use a labor union to drive competitors out of an industry (as distinguished from petitioning the secretary of labor to establish a prevailing wage under the Walsh-Healy Act as in *Pennington*) that is related in any fashion to the constitutional right to petition an individual's government representative.

Under ordinary antitrust law where constitutional rights are not thus involved, the long established rule is that which is stated in *American Tobacco Company v. United States*, 328 U.S. 781:

> "It is not the form of the combination or the particular means used, but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful."

and more specifically this Court said in *United States v. Reading Co.*, 226 U.S. 324, 357:

> "It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. *Aikens v. Wisconsin*, 195 U.S. 194, 206. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other States, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful."

And with particular reference to the kind of conspiracy charged here, this Court said in *United Mine Workers v. Pennington*:

> "One group of employers may not conspire to eliminate competitors from the industry and the Union is liable with the employers if it becomes a party to the conspiracy. This is true even though the Union's part in the scheme is an undertaking to secure the same

wages, hours or other conditions of employment from the remaining employers in the industry." (381 U.S. 665-666)

F. CONSOL'S CONTENTION UNDER ITS QUESTION NO. 4 AND UMW'S CONTENTION UNDER ITS QUESTION NO. 3 THAT THE TRIAL COURT FAILED TO GIVE A CHARGE UNDER THE CLEAR PROOF RULE ADEQUATE TO PROTECT THE RIGHTS OF BOTH DEFENDANTS IS WITHOUT BASIS IN FACT. THE TRIAL COURT GAVE BOTH DEFENDANTS THE BENEFIT OF A GENEROUS INSTRUCTION UNDER THE CLEAR PROOF RULE OF THE KIND THEY THEMSELVES REQUESTED.

Predatory conspiracy was the illegal act charged in this case.

The District Court charged the jury " ... such an anti-competitive conspiracy as claimed by the plaintiff must be established by clear proof." (1836)

The Court finished off charging the jury what clear proof means at a place in the charge where there can be no doubt that it had greater impact than if it had been buried in the charge. Shortly before the jury was sent to deliberate the Court left defendants' own version of clear proof strong and fresh in the minds of the jury as follows:

"Members of the jury, the Court has already charged you that the issue of alleged conspiracy in this case must be decided upon clear proof, that is, the plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof." (1915)

The foregoing charge is essentially the charge on clear proof that was invited by the defendants (1755, Consol's request No. 28; 1741, UMW's request No. 16). It extends beyond the requirements of the majority opinion of this Court in *Ramsey*. We submit it also satisfies the minority opinion in *Ramsey*.

If the Court will recall, in *Ramsey*, UMW has argued that where a union was a defendant all elements of the alleged agreement or conspiracy itself must be proved by clear proof (as it had successfully argued in *Second Pennington*), but after this Court granted certiorari in *Ramsey*, and realizing the weakness of its previous successful arguments along this line, UMW switched to the contention that Section 6 really was limited to proving authorization, ratification or participation in acts of agents; but that the Trial Court in *Ramsey* had actually so limited the rule.

Petitioners yet again raise this matter of the clear proof rule, but we submit that the foregoing portions of the charge of the Court to the jury adequately protected both the defendants exactly in the way they were seeking to be protected.

Realistically, and referring to our Statement of Facts above, we submit that it would truly be impossible to pick out any of the acts of agents in this case which was not clearly authorized by the respective principals.

The language in the Court of Appeals opinion concerning the clear proof rule was aimed at the arguments which existed before UMW switched its contentions with respect to clear proof in the *Ramsey* case. In cases before *Ramsey*, UMW's argument was not aimed primarily at specific language in Section 6, but was more related to the exemption provided unions under antitrust statutes when they act alone. UMW had urged that when a union was involved as a defendant in an antitrust case, a new standard of proof

should be fashioned for determining the issues of liability. But this Court rejects such contentions in *Ramsey* saying:

> "Nor do we discern any basis for ourselves fashioning a new standard of proof applicable in antitrust actions against labor unions."

In similar fashion and with considerable elaboration of its reasoning, the Court of Appeals reaches the same result that simply because a union is involved does not mean that the Court should fashion a new rule of liability in antitrust conspiracies, over and beyond the language of Section 6.

But the fundamental question of whether or not the charge to the jury adequately protected the defendants must be answered in the affirmative as shown from the foregoing quoted portions of the charge.

This Court has decisively and clearly resolved all questions concerning the meaning and extent of the clear proof rule in *Ramsey* and prior cases, and it would serve no purpose to review this question again at this time.

G. THE COURT OF APPEALS HAD CORRECTLY AND FULLY ANSWERED ALL OF THE CONTENTIONS RAISED BY THE FIFTH QUESTION IN CONSOL'S PETITION AND THE FOURTH QUESTION IN UMW'S PETITION CONCERNING ALLEGED IRREGULARITY IN PROCEDURE IN THE DISTRICT COURT.

The petitioners insert a conglomeration of questions concerning procedural matters in this case all of which were fully answered by the Court of Appeals.

1. It Was Not Error to Allow Proof of the Effects of Defendants' Conduct.

Under Consol's first point under its fifth question, it asserts that the trial developed into a contest "between the populus of Eastern Kentucky on the one hand, and UMWA and petitioner on the other." There *was* considerable presentation of the effects and consequences of the defendants' course of conduct which clearly was creating distress to the Appalachian coal mining communities, such as those in Eastern Kentucky. But this kind of evidence is necessary in this case as in any other antitrust case.

In this case the plaintiff relied on both direct proof of conspiracy and circumstantial evidence based largely on the effects and consequences of the course of conduct of the defendants. The Supreme Court warned in *United Mine Workers v. Pennington*, *supra*, that in this type of case the circumstantial evidence would have to extend beyond merely showing that the defendants suspected that the weakest units of the industry could not conform with the national contract labor terms. The effects and consequences would have to be more radical than that. The proof in this case did go beyond those limited conditions, both from the national viewpoint and with respect to Eastern Kentucky.

In addition, it is to be recalled that proof of public injury in a Sherman Act case was, up to very recently, not only permissible but was mandatory. Even today many courts require such proof in a case not based on a per se violation, although such public injury "need not be nationwide in geographical scope" (see *Reliable Volkswagon S & S Company v. World Wide Auto Corp.*, 182 F. Supp. 412, 425-6; *Continental Ore Company v. Union Carbide Corp.*, 370 U.S. 690, 708). Plaintiff complied with this requirement also particularly showing the resulting situation in Eastern Kentucky.

Also, we submit that all of this proof was admissible in the face of the contentions of the defendants. Proof that UMW's course of conduct was benefiting Consol to the extreme and restraining, on the other hand, the trade and commerce and competition of great areas of the coal industry was certainly pertinent to the defense that the union's conduct was unilateral, not to benefit Consol. Similarly, proof as to the effect on vast unemployment of union members, both nationally and in Eastern Kentucky was pertinent when UMW's principal defense was that it was acting unilaterally for union purposes alone to benefit union members.

In the face of such contentions by the defendants, it was inevitable and absolutely necessary that the plaintiff submit this type of proof in presenting its evidence of a predatory conspiracy to destroy competition in the bituminous coal industry.

2. The Defendants Were Protected as to Alleged Hearsay Evidence.

The second point raised under the fifth question at page 23 of the Consol petition deals with the alleged failure of the District Court to charge the jury as to certain hearsay evidence (evidence which was actually taken in regular discovery interrogatories from the official records of one of the defendants). The Court of Appeals very adequately and fully answered this contention in its opinion under the heading "E. Instructions Respecting the Use to be Made by the Jury of Certain Hearsay Statements."

It is also to be observed in this connection that during the course of the trial, the District Court very fully and repeatedly charged the jury, as this evidence was presented, the full protections that a defendant is entitled to as to such evidence, and this was to the complete satisfaction of both defendants (376-8, 423-4, 430, 880, 1525).

3. The Jury Charge Was Proper Without Including the "Equal Hypothesis Rule."

The third contention under Consol's fifth question at page 23 of its petition concerns the alleged failure of the Court to charge the jury as to the so-called "equal hypothesis rule." The Court of Appeals has very fully answered this contention in its opinion under the heading "D. Equal Hypothesis Rule," under the part of the opinion dealing with alleged errors in instructions.

4. The Evidence Was Sufficient to Support the Verdict.

Under the fourth contention made under the fifth question raised by Consol at page 24 of its petition, the petitioners question the sufficiency of the evidence by pointing to the District Court's denial of motions for directed verdict and motions for judgment n.o.v. based on that ground. However, it is submitted that our statement of the facts, supra, shows quite clearly that there can be no question in this case that there was ample and sufficient evidence to support the jury verdict of liability.

5. There Were No Irregularities Pertaining to the Jury That Prejudiced the Defendants.

The fifth contention made by Consol under its fifth question at pages 24 and 25 of its petition and the fourth question raised by the UMW petition relate to alleged irregularities concerning the jury in the course of the trial. *The record shows that UMW's statement of these matters in its petition implies irregularity that did not exist.* The Court of Appeals (as well as the District Court) has very fully answered these contentions and has shown that they are not substantial grounds of complaint and certainly

could not be prejudicial, treating these matters in the third main part of its opinion under the heading "Alleged Irregularities with Respect to the Jury."

6. The Jury Charge Was Not Generally Inadequate or Prejudicial.

The final contention made by Consol under its fifth question at page 25 of its petition is that the charge generally was inadequate, confusing and prejudicial. We submit that this is an incorrect analysis of the charge of the Court in this case. We think that the trial court here did an excellent job in conveying to the jury the nature of the issues that it was supposed to decide. This jury was not a group of lawyers or economic experts, but 12 citizens made up of a broad cross-section of all of the communities of Eastern Kentucky. The defendants had demanded that the Court select the jury, not just from the local division, but from all divisions of Eastern Kentucky (much of which was not in the coal mining area) running from Tennessee to Ohio and from the middle part of the state to Virginia, and the Court granted this wish (33, 36). The Court was talking to this broad cross-section of people about a long and complex trial when he gave the charge.

Before giving the charge and during the course of the trial in colloquies with counsel outside the presence of the jury, the Trial Judge showed his concern that the jury clearly understand the questions it was to decide. His strongly expressed feeling was that it would be unfair to both sides if the issues were not stated simply and clearly and if jurors became confused by a morass of meticulous and argumentative instructions. He made this very plain to counsel. The Learned Trial Judge has had considerable experience on the bench and in long, complex cases and

knows the confusion in which the jury is apt to be left by long-winded charges. His comment was:

> "My idea about these instructions, you can just over-instruct a jury. This is a complicated matter and I can narrow it down and give a sharp issue to them to decide—it is easy to get confused on many things in a long case." (1526-7)

The Court later was disappointed that he did not get too much help from counsel on their suggested instructions in keeping the issues clear. He was particularly disappointed that the requests of the defendants would have the Court argue defendants' case to the jury and would leave the jury in a fog (1584-6). He said again:

> "I do want to impress upon you the idea which I believe is imperative in this case—to try and draw a sharp issue for the jury to decide, and not have them go out there into the jury room in such a maze or quandry that they feel like they are not competent to decide the case—because they are, and the issue is sharp." (1589-90)

Subsequently, the Court advised counsel the nature of the charge the Court intended to give including the issue to be answered by the jury (1690-7). This was substantially the charge given the jury, except for some preliminary explanations given the jury.

Considering the help (or lack thereof) given in the requested charges we believe the Court has done the best job possible in presenting the case in form that would be valid and legal without giving the extreme overstatements of defendants' case insisted upon by defendants (1736-1766). Defendants criticized and objected to every effort of the Court to state the case without themselves coming up with

requests that would be correct, fair, clear, concise *and relevant to the single theory of predatory conspiracy presented to the jury*.

The question here is whether the charge *considered as a whole* was fair and adequate without substantial prejudice to defendants. Flaws can be found in almost any charge by separating certain paragraphs from the whole. Thus, the charge must be considered as a whole to determine whether it gave the jury a correct understanding of the propositions which they are to decide and the pertinent principles of law which shall guide them in their decision. See the numerous cases at Vol. 49, *Federal Practice Digest*, Trials, Section 295(1).

CONCLUSION

For the foregoing reasons, respondent submits that the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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